88-2124

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOSE S. DELEON AND
MARIA G. DELEON,

Petitioners,

v.

ST. JOSEPH HOSPITAL, INC. AND
WILLIAM L. MACON, IV,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED[1]

I. DID THE TRIAL COURT MISAPPLY ANDERSON V. LIBERTY LOBBY, 477 U.S. 242 (1986) AND THEREBY ERR IN GRANTING SUMMARY JUDGMENT AGAINST THE PETITIONER ON HIS DEFAMATION CLAIMS BECAUSE THE COURT MADE FINDINGS OF FACT AND DREW INFERENCES IN DETERMINING WHETHER THERE WAS SUFFICIENT EVIDENCE UPON WHICH A FAIR MINDED JURY COULD CONCLUDE RESPONDENTS' ACTED WITH MALICE AND BAD FAITH?

II. DID THE TRIAL COURT MISAPPLY ANDERSON V. LIBERTY LOBBY, 477 U.S. 242 (1986) AND THEREBY ERR IN GRANTING SUMMARY JUDGMENT AGAINST THE PETITIONER ON HIS DEFAMATION CLAIMS BECAUSE THE COURT DID NOT CONSIDER PETITIONERS' FACTUAL THEORY OF THE CASE CONCERNING RESPONDENTS' STATE OF MIND?

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[1] All parties to the proceeding below are set forth in the caption of this case.

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IN THE
SUPREME COURT OF THE UNITED STATES

No. _____

October Term, 1988

JOSE S. DELEON and
MARIA G. DELEON

PETITIONERS,

v.

ST. JOSEPH HOSPITAL, INC. and
WILLIAM L. MACON, IV

RESPONDENTS[2]

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Petitioners Jose S. DeLeon and Maria G. DeLeon, his wife, request that the Supreme Court of the United States grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit,

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[2] All the parties below are set forth in the caption of this case.

entered in the above captioned proceeding on April 6, 1989.

REFERENCE TO OPINIONS BELOW

On March 3, 1988, the Honorable Alexander Harvey, II, Chief Judge, United States District Court for the District of Maryland, issued a memorandum opinion (unreported)(APX. 1-44)[3]. On April 6, 1989, the United States Court of Appeals for the Fourth Circuit issued a published opinion, which was recorded as DeLeon v. St. Josephs Hosp., et al., 871 F.2d 1229 (4th Cir. 1989)(APX. 47-86).

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Fourth Circuit for which Petitioners seek review was entered on April 6, 1989. Jurisdiction

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[3] The designation APX. refers to the pages of the Appendix.

of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Petitioners Jose S. DeLeon, M.D., and Maria G. DeLeon, his wife, instituted this diversity action against the Respondent Saint Joseph Hospital of Maryland, Inc. (the "Hospital") and the Respondent William L. Macon IV, the Hospital's chief of surgery.[4] Petitioner Dr. DeLeon successfully completed his postgraduate residency training in

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[4] Jurisdiction was invoked in the District Court pursuant to 28 U.S.C. § 1332. Petitioners each are citizens and subjects of the Republic of the Philippines. Respondent St. Joseph Hospital, Inc. is incorporated under the laws of the State of Maryland and has its principal place of business in Towson, Maryland. Respondent Dr. Macon is a citizen of the State of Maryland. The amount in controversy exceeds Ten Thousand Dollars ($10,000.00), exclusive of interest and costs.

general surgery at the Respondent Saint Joseph Hospital. Both Respondents certified pursuant to prescribed professional standards that Dr. Deleon had satisfactorily completed post graduate training as a surgeon and was competent for the independent practice of surgery. Petitioner Dr. DeLeon applied for admitting privileges at the Hospital and his application was rejected on the basis that his credentials were unsatisfactory and that he was not capable of the independent practice of surgery. Petitioners alleged, among other things, that Dr. Macon had defamed Dr. DeLeon and that the Hospital was responsible, as well as Dr. Macon, on the basis of respondent superior. Petitioners contended that the denial of privileges at the Hospital and the loss

of his employment at the Hospital were occasioned by Respondent Macon's publication of false factual information, which Dr. Macon knew to be false or stated with reckless disregard of the truth.[5] (APX. 88-94).

At the conclusion of discovery, Respondents moved for summary judgment on the ground, among others, that there was no evidence of malice, bad faith or other egregious conduct on the part of Dr. Macon to surmount Respondents' contractual, statutory or common law immunities

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[5] Because the hospital that trained him has denied him privileges on the basis of unsatisfactory credentials, Petitioner is precluded from obtaining employment as a physician or practicing as a surgeon.

and privileges.[6] Petitioners responded that there was evidence in the record that Respondent Dr. Macon employed calculated distortions of facts and other factual falsehoods and otherwise acted in bad faith.[7] Petitioner's supporting

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[6] Winterstein v. Wilcom, 16 Md. App. 130, 135-36, 293 A.2d 821 (1972), cert. denied; 266 Md. 744 (1972); Boucher v. Riner, 68 Md. App. 539, 543, 547, 514 A.2d 485 (1986); Hanrahan v. Kelly, 269 Md. 21, 28-32, 305 A.2d 151 (1973); Jacron Sales Co. v. Sindorf, 276 Md. 580, 597-601, 350 A.2d 688 (1976); Mareck v. Johns Hopkins Univ., 60 Md. App. 217, 224-25, 482 A.2d 17 (1984) cert. denied; 302 Md. 288 (1985); Maryland Health Occupation Code §§ 14-601 & 14-603.

[7] The expression of one's derogatory opinion about another is generally protected speech under the common law of defamation and the First Amendment. Expressions of opinion supported by intentionally false statements and distortions of fact are not. Neither the First Amendment nor the common law shield those that intend to inflict harm through opinion based on calculated falsehood. Garrison v. Louisiana, 379 U.S. 64, 73, 75 (1964); Berkey v. Delia, 287 Md. 302, 329-32, 413

memorandum in the District Court

A.2d 170 (1980). An actionable statement may consist of a statement in the form of an opinion where the defendant expresses his opinion based on his own expressed statement(s) of false and defamatory facts. The expression of opinion supported by calculated distortions and falsehoods that adversely affect another's employment and profession are actionable. A.S. Abell Co. v. Kirby, 227 Md. 267, 279-81, 176 A.2d 340 (1961); Berkey v. Delia, 287 Md. at 330; Hearst Corp. v. Hughes, 297 Md. 112, 118, 466 A.2d 486 (1983); Mareck v. Johns Hopkins Univ., 60 Md. App. 217, 223, 482 A.2d 17 (1984) cert. denied; 302 Md. 288 (1985); Restatement (Second) of Torts § 566 (Expression of opinion), Comment c, at 175.

If a defendant bases his expression of a derogatory opinion of the plaintiff on his own statement of facts that are not defamatory, he is not subject to liability for the factual statement - nor for the expression of opinions, so long as it does not reasonably indicate an assertion of the existence of other common defamatory facts that would justify the forming of the opinion. If a defendant expresses a derogatory opinion without disclosing the facts on which it is based, he is subject to liability if the comment creates the reasonable inference that the opinion is justified by the existence of unexpressed defamatory facts. Restatement (Second) of Torts, § 566, supra.

contained a twenty-seven page statement of facts, which referred the Court to specific portions of the record to support Petitioner's factual theory of the case.

The District Court, relying on Anderson v. Liberty Lobby, 477 U.S. 242 (1986), concluded that Dr. DeLeon had "failed to point to specific facts that would establish extreme or wanton conduct on the part of the defendants."[8] (APX. 18-19). The Court also concluded that Dr. DeLeon "made no showing of bad faith or malice on the part of Dr. Macon". (APX. 40-41). On appeal, Petitioner contended that the District Court made findings of fact and drew inferences in a

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[8] Petitioner's memorandum below contained a twenty-seven page statement of facts, which referred the Court to specific portions of the record.

light most favorable to the Respondents. In his brief, Petitioner again detailed the factual theory of his case with supporting references to the record. The Court of Appeals affirmed. It stated:

> The proper analysis, therefore, is not simply whether there were disputed issues of fact; clearly DeLeon has met that simple burden. "Only disputes over facts that might affect the outcome of the suit under the governing laws will properly preclude the entry of summary judgment." Anderson, 477 U.S. at 248. Even after considering the record in the light most favorable to DeLeon, we are unable to detect any issue of fact relevant to the disposition of the case that would preclude the defendants from judgment as a matter of law.[footnote omitted] (APX. 59).

Petitioners' contentions here are that both the District Court and the Court of Appeals, in applying Anderson, viewed the facts in the context of the Respondents' theory of the case and in isolation from what Petitioner contended were the factual circumstances against which the

existence of a material dispute of fact should be measured. Neither court addressed the anomaly that both the Hospital and Dr. Macon certified that Dr. DeLeon was qualified for the independent practice of surgery and then rejected his application on the basis that he was not qualified for the independent practice of surgery.

The factual theory of Petitioner's case- to which there was no reference in either opinion below -is as follows. St. Joseph Hospital provided Dr. DeLeon with a professionally prescribed regiment of specialized training. In June 1983, Petitioner Jose S. DeLeon, M.D. successfully completed five years of professional postgraduate residency training in general surgery at the Hospital. Dr. DeLeon was a chief resident in the pro-

gram during his last year of training.[9]

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[9] The Hospital's Chief of Vascular Surgery described Dr.Deleon in a November 22, 1982 letter of recommendation:

> Dr. DeLeon joined us on the third year level of surgical training and at the present is in the Senior level. I have worked with Dr. deLeon as the Chief of the Thoracic and Vascular Service during the past 2 years and have found him to be very cooperative sincere in his work. He has given good patient care, handles himself well technically and exercises good judgment. He is thorough in his work. Likewise conferences and discussion when his participation is indicated he responds quite well and in a reasonable manner with well thought out responses. He is of good moral character with good habits and gets along quite well with everybody.
>
> My one adverse comment regarding Dr. DeLeon would be that he does not manifest the usual aggressiveness that one commonly sees in surgeons. I have liked him in all other respects and therefore did take the trouble to inquire where he had been in training at his previous location and I received the same response that he was very adequate in all other areas but he was sort of quiet and retiring. I spoke with several of

The Hospital and Dr. Macon certified to the American Board of Surgery and others that Dr. DeLeon satisfactorily completed his training as a surgeon and that he was

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> his countrymen who are his coworkers and they tell me that this is a trait of his culture in his particular locality and is thought to be a manifestation of high culture there. One notes this in his lack of aggressiveness in defending his position which is mostly right but certainly is not reflected when he is requested to do a specific task.
>
> I think he would be a very honest, sincere and hard working associate and not the type at all to stir muddy waters. I certainly would look upon him favorable as an associate if he were in the same specialty.

Dr. Miller did not change his opinion of the Petitioner as of the date of his deposition on October 28, 1986. Dr. Miller is the supervising doctor referred to in the District Court opinion as stating the Petitioner was extremely hesitant and nervous in surgery. Dr. Miller, however, did not express any reservations about Dr. DeLeon until he had a conversation with Dr. Macon sometime after May 29, 1984.

competent for the independent practice of surgery. After his graduation, Dr. DeLeon was employed by the Hospital as a surgical house officer. In January 1984, Dr. DeLeon applied for admitting privileges at the Hospital. (APX. 6-7).

Dr. Macon, in opposition to the application, made written statements, which Petitioner contends Dr. Macon knew were false, that there had been complaints that Dr. Deleon had failed to respond to coverage calls and medical emergencies.[10] Dr. Macon also wrote that

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[10] There was no evidence in the record of Dr. DeLeon failing to respond to emergencies until May 1985, i.e., late in the events of this case. The complaints appear to have been related to an inadequate staffing in the hospital during the night time hours. Documentation that should have existed about any serious failings of Dr. DeLeon was absent. Dr. DeLeon was under supervision, and serious concerns about house surgeons would be reflected in the minutes of the surgical advisory

committee. Yet, Dr. DeLeon was not mentioned. Dr. Macon's practice was to require any person or physician making a complaint about a physician to put it in writing. He would then review the patient's chart and, if he reprimanded someone, he would dictate his concerns, which would be typed and placed in a file maintained in Dr. Macon's office. Dr. Macon had no written complaints. He did not examine any charts, make any investigation or have any specifics. There were no writings reflecting the particulars about these very serious allegations of derelictions on the hospital floors.

Dr. Macon refused to conduct a follow up investigation to ascertain particulars when requested to do so by Dr. DeLeon. Dr. Macon did not identify the source or the specifics of the complaints when asked to do so by Dr. DeLeon-- and still does not. Dr. DeLeon's accusers were always faceless; and, the allegations, amorphous. There was always a lapse of time--often weeks after a purported event, before Dr. Macon expressed his purported concerns to Dr. DeLeon. Dr. Macon supposedly received a report that the only house surgeon on duty at night in the entire hospital with a multitude of responsibilities, if not inordinate amount, could not be found for three hours; and, yet, Dr. Macon took no action and made no investigation for particulars or immediate follow-up. If he believed the complaints that he purportedly received or believed them

Dr. DeLeon was "[g]iven credit for [his] completing surgical residency at Saint Joseph Hospital". Thereafter, Sullins G. Sullivan, M.D., Dr. Macon's predecessor as chief of surgery, and Benjamin V. DelCarmen, M.D., the Hospital's director of training for the surgical residency, provided favorable appraisals and recommended Dr DeLeon for privileges. The Hospital also received responses favorable to Dr. DeLeon from its inquiries to all other institutions at which Dr. DeLeon trained.[11] In response,

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material, Dr. Macon would have acted to have Dr. DeLeon removed or sanctioned.

[11] The Court of Appeals stated that Petitioner had not been reappointed to the Pennsylvania College of Medicine Residency program. (APX. 48-49). The April 18, 1984 response of the Medical College of Pennsylvania to the St. Joseph request for a reference states:

During his residency year with us, Dr. DeLeon proved to be a quiet, conscientious

Dr. Macon recruited A. Andrew Alecce, M.D. and Roberto Ferrer, M.D., two physicians who had participated peripherally in the Petitioner's training at the Hospital.[12] Both recommended that

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and thoughtful worker. He demonstrated high ethical standards.

We found his work satisfactory in every way. ... . (Joint Appendix in Court of Appeals, page 71.)

[12] Dr. James, the chairman of the credentials committee in 1984 and later chairman of the Medical Executive Committee, testified that Board certification and Part I of the Boards were not requirements for privileges at the Hospital. The only reason stated in the July 16, 1984 minutes of the credentials committee for the recommendation of denial of privileges was that Dr. DeLeon failed Part I of the Boards. Both Drs. Macon and Ferrer were members of that committee. Dr. Macon advised the second ad hoc committee that no one had been accepted for privileges who had failed Part I of the Boards during his tenure as chief of surgery. On September 13, 1983, Dr. Macon approved a St. Joseph graduate who had failed Part I of the Boards. He also told the committee that he had denied no other applicant the number of procedures on a Delineation of

Dr. DeLeon not be accepted for privileges on the basis that he was not qualified to have completed his training. Both, however, had voted on March 11, 1982 that Dr. DeLeon should complete his training and graduate. Dr. Macon also asked Dr. DelCarmen whether he stood by what he had written.

After learning in October 1984 that his application had been rejected, Dr. DeLeon and his attorney met with the Hospital's attorney and its Vice President on two occasions to discuss Dr. DeLeon's continued interest in privileges.[13] In ensuing communications

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Privileges form as he had for Dr. DeLeon.

[13] Shortly after these meetings, Dr. Macon ridiculed Dr. DeLeon's intelligence and medical knowledge during a surgery in the presence of other health care providers.

between the Hospital and Dr. DeLeon's attorney, the Hospital took the position that Dr. DeLeon's performance as a house surgeon was competent and satisfactory. The Hospital then undertook consideration of what criteria Dr. DeLeon could meet as an employee of the Hospital to obtain privileges. Dr. Macon, in reaction to this dialogue, threatened to relieve Dr. DeLeon from his duties.

On May 6, 1985, Dr. Macon wrote a letter to the Hospital Vice President that Dr. DeLeon failed on April 19, 1985 to respond to attend to an elderly patient after the patient had fallen and struck his head near the right orbit and complained of chest pain.[14] Before

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[14] This matter purportedly came to Dr. Macon's attention via a May 3, 1985 memorandum from a head nurse, i.e., approximately two and one-half weeks after the alleged episode. No other

writing the letter, Dr. Macon reviewed the patient's chart, which reflected no chest pains at any time remote to Dr. DeLeon's involvement or purported lack thereof with the patient. The chart reflected no head injury whatsoever. Dr. Macon was also advised by a nurse, involved in the incident, that the patient had a condition other than chest pains or a head injury. Dr. Macon, nevertheless, suggested that the patient died as a consequence of Dr. DeLeon's inaction. Dr. Macon ignored Dr. DeLeon's request to review the medical records with him and otherwise refused to give Dr. DeLeon details. Dr. DeLeon had in fact responded to the patient in a timely

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writings reflect this complaint exists. This complaint is contrary to the patients medical records.

fashion.[15] Dr. Macon's letter became the basis of Dr. DeLeon's summary termination from the Hospital's employment in late May 1985.[16]

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[15] This is confirmed by the patient's medical records, an incident report and another physician.

[16] Dr. Macon's writings and activity ebbed and flowed in response to activity in the credentialing process. Dr. Macon's writings, memoranda and letters concerning Dr. DeLeon began in December 1983, shortly after Dr. DeLeon expressed interest in applying for privileges and ceased shortly before the credentials committee met on July 16, 1984. Dr. Macon did not call upon Drs. Alecce and Ferrer for their appraisals until Drs. Sullivan and DelCarmen and the hospitals where Dr. DeLeon previously trained had submitted favorable information; and, he wrote a June 21, 1984 letter recommending against Dr. DeLeon's privileges immediately after he received the Alecce and Ferrer appraisals. A few weeks after Dr. DeLeon retained the services of Mr. Franz to represent his interests and meetings ensued with the Hospital vice president and attorney, Dr. Macon ridiculed Dr. DeLeon's medical knowledge during surgery in front of others. Dr. Macon's flourish of memoranda/letters to Dr. DeLeon's file resumed on March 28, 1985. This was

On August 27, 1985, an ad hoc appeals committee was convened to reconsider Dr. DeLeon's credentials. Before the committee met, Dr. Mahon told Dr. DeLeon that nothing would change if Dr. Macon did not change his position. This committee was replaced, after it reached findings favorable to Dr. DeLeon, i.e., Dr. DeLeon's credentials were satisfactory through the conclusion of his residency. A second ad hoc committee met on December 16 & 19, 1985. It con-

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shortly after Dr. Macon learned of a letter from the hospital's attorney to its vice president which stated that the Hospital stated to Dr. DeLeon's attorney, that Dr. DeLeon had performed competently and satisfactorily during the course of his employment duties as a house surgeon. Dr. Macon's letter of March 28, 1985 to Dr. DeLeon threatened to relieve Dr. DeLeon of his duties. His letter of April 15, 1985 told Dr. DeLeon that his contract would not be renewed as of July 1, 1985. On May 6, 1985, Dr. Macon put Dr. DeLeon's suspension in motion.

cluded Dr. DeLeon had failed to demonstrate that the Board's first decision should be set aside. The committee's report placed emphasis on the head injury and chest pains of the patient to which Petitioner allegedly did not respond. The Hospital's Board of Trustees denied Dr. DeLeon privileges on May 23, 1985.

ARGUMENT

This Court stated in Anderson v. Liberty Lobby, 477 U.S., at 255 that:

> Our holding that the clear-and-convincing standard of proof should be taken into account in ruling on summary judgment motions does not denigrate the role of the jury. It by no means authorizes trial on affidavits. Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor. Adickes v. Kress Co., 398 U.S. 144, at 158-159.

> Neither do we suggest that the trial courts should act other than with caution in granting summary judgment or that the trial court may not deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial. [Emphasis supplied; citation omitted].

This case, however, involved a trial by affidavit. The joint record appendix was thirteen hundred and thirty-seven pages. The Court of Appeals characterized its opinion as "exhaustive (or exhausting)". (APX. 85). Both courts below enmeshed themselves in the fact finding process.[17] The backdrop against which the courts below viewed the facts was that of the Respondent's theory of the case. The factual point of reference against which materiality should have been measured was

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[17] The Court of Appeals in this case concluded its opinion with "the fault, dear Brutus, is not in our stars." (APX. 86).

that by the Petitioner. The courts below did not examine whether state of mind evidence existed in reference to Petitioner's factual theory of the case and his statement of facts. Instead, Petitioner's theories were completely ignored. The theory of the case, however, whether it be the Government's in a criminal prosecution or a plaintiff's in a civil case, is the factual reference upon which its case is to be judged. Whitley v. Albers, 475 U.S. 312, 330 (1986); Dowling v. United States, 473 U.S. 207, 225 (1985); United States v. Brewster, 408 U.S. 501, 506 (1972); Pipefitters' Local Union No. 562 v. United States, 407 U.S. 385, 436-37 (1972); Gallick v. Baltimore & Ohio R.R. Co., 372 U.S. 108, 113-14 n.3 (1963); Dennis v. United States, 341 U.S. 494,

542 (1951); Toomer v. Witsell, 334 U.S. 385, 400 n.34 (1948).

The involvement of the courts below in the fact finding process is inconsistent with this Court's dictates in Anderson, as well as contrary to the decisions of other courts of appeal concerning state of mind factual issues in the context of summary judgment. See, e.g., Empire Electronics Co. v. United States, 311 F.2d 175, 180 (2d Cir. 1962); Moran v. Bench, 353 F.2d 193, 195 (1st Cir. 1965); see also, 10A Wright, Miller, & Cooper, Civil § 2730 (actions involving state of mind). This involvement in the fact finding process appears to have resulted from a misunderstanding of Anderson and the standard by which a court is to determine whether a "fair minded jury" could conclude that a

defendant had the requisite state of mind. Anderson, 477 U.S., at 252. This involvement in the fact finding process was of concern to Justices Brennan and Rhenquist, both of whom authored dissenting opinions in Anderson, 477 U.S., at 257, 268. Clarification of how the courts are to apply Anderson would mollify the concerns expressed by the dissenters in Anderson and provide guidance in motions for summary judgment where state of mind is at issue.

CONCLUSION

Petitioners respectfully request that the Court grant a writ of certiorari in order to clarify and provide guidance concerning its holding in Anderson v. Liberty Lobby, 477 U.S. 242 (1986).

Respectfully Submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JOSE S. DE LEON, M.D., et al.	*	
Plaintiffs	*	
vs.	*	CIVIL NO. H-86-1609
SAINT JOSEPH HOSPITAL, INC., et al.	*	
Defendants	*	

* * *

MEMORANDUM OPINION

Presently pending in this civil action is defendants' motion for summary judgment. In this suit, plaintiff Jose S. de Leon, M.D. (hereinafter "de Leon" or "Dr. de Leon") seeks to recover both compensatory and punitive damages, allegedly resulting from the denial of medical staff privileges by defendant Saint Joseph Hospital, Inc. (hereinafter "the Hospital" or "St. Joseph Hospital").

Plaintiff has also sued William L. Macon, IV, M.D. (hereinafter "Dr. Macon"), the head of surgery at the Hospital. A derivative claim has been asserted on behalf of Dr. de Leon's wife, Maria G. de Leon. In addition, plaintiff seeks injunctive relief compelling the Hospital to grant him medical staff privileges.

Dr. de Leon and his wife are citizens of the Philippines, while the Hospital is incorporated under Maryland law. Jurisdiction is thus based herein on 28 U.S.C. § 1332.

The parties have submitted lengthy memoranda and numerous exhibits in support of and in opposition to the pending motion. Both sides have availed themselves of the opportunity to conduct ample discovery. Indeed, more than 20 depositions have actually been taken, and

the transcripts have been filed herein and considered by the Court in ruling on the pending motion. Oral argument has been heard in open Court on February 19, 1988. For the reasons stated herein, defendants' motion for summary judgment will be granted.

I

Factual Background

Dr. de Leon's association with the Hospital began in 1980 when he entered its residency training program as a third-year resident in surgery. Prior to that, Dr. de Leon had received his medical degree from the University of the Philippines in 1970 and had performed a general surgical residency at the Philippines General Hospital Medical Center from 1970 until 1975.

In 1976, Dr. de Leon emigrated to

the United States where he undertook a one-year fellowship at the Texas Heart Institute. Dr. de Leon next moved to New York where he performed an internship and a residency at the Brooklyn-Cumberland Medical Center from 1977 to 1979. In 1979, Dr. de Leon transferred to the Pennsylvania College of Medicine for his second year of residency. Because of substandard performance on his part, Dr. de Leon was not reappointed to a third year of residency. Accordingly, Dr. de Leon was forced to apply to numerous other residency programs throughout the United States. Of those programs that accepted his application, Dr. de Leon selected the residency program of St. Joseph Hospital because it was the only one that would not have required him to repeat a year of training.

Dr. de Leon signed a contract extending from July 1, 1980 to June 30, 1981 upon entering the Hospital's program as a third year resident. He also agreed to contracts for comparable periods of time for his fourth and fifth years of residency from 1981 to 1983. After completion of his fifth and final year of residency, de Leon was hired by the Hospital as a contractual physician or "house officer" for the period of July 1, 1983 to June 30, 1984.

In January 1984, Dr. de Leon applied to the Hospital for medical staff privileges which would allow him to admit private patients to the Hospital for surgery. As a house officer, Dr. de Leon did not possess such privileges and could treat patients only under the supervision of another physician. In applying for

staff privileges, Dr. de Leon was required to sign a statement that included the following provision:

> I release Saint Joseph Hospital, Inc., its agents, servants, employees and staff members from liability for all acts performed in connection with evaluating my application and my credentials, qualifications and practices, and I release from liability any and all individuals and organizations who provide information to Saint Joseph Hospital, Inc. concerning my professional competence, medical practice patterns, ethics, character, and other qualifications for staff appointment and clinical privileges. I consent to the release of such information including otherwise privileged or confidential information to Saint Joseph Hospital, Inc.

During the pendency of Dr. de Leon's application for privileges, his employment contract with the Hospital was renewed for an additional year. However, Dr. de Leon never completed his final

year as a house officer inasmuch as he was terminated by the Hospital for reasons that will be discussed herein.

Pursuant to the by-laws of the Hospital, Dr. de Leon's application for privileges was first forwarded to the Credentials Committee, which consists of seven appointed and elected members. As part of the process, Dr. Macon, in his position as head of surgery, was required to assess Dr. de Leon's qualifications and to make a recommendation as to whether they were satisfactory or unsatisfactory. In his capacity as head of surgery, Dr. Macon oversaw the work of the surgical house officers. Thus, he had had the opportunity to evaluate Dr. de Leon's medical skills directly. Dr. Macon had received numerous complaints concerning Dr. de Leon's failures to show

up for his required duties, concerning his refusals to see patients when requested to and concerning his unavailability on numerous occasions when he was "on call."

Dr. de Leon's abilities as a surgeon were also questionable. One doctor who had supervised him during his residency had commented on his extreme hesitancy and nervousness during surgery. Another doctor who had supervised Dr. de Leon had, in fact, voted against permitting de Leon even to continue his residency because of doubts about his competency. These subjective impressions were confirmed by Dr. de Leon's performance on objective tests. During his residency at the Brooklyn-Cumberland Medical Center,

he scored in the 21st percentile[1] on the In-Training Examination. During his residency at the Hospital, he scored in the 11th percentile in a similar test. Moreover, he failed the American Board of Surgery's examination for board certification in 1983, scoring in the 17.6 percentile.[2]

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[1] An examinee's percentile ranking is the standardized measure, reported on a scale of one to one hundred, of how he had performed compared to all other examinees. For instance, an examinee who received the tenth highest grade out of a group of one hundred examinees would score in the 90th percentile, as would an examinee who received the second highest grade out of a group of twenty examinees.

[2] In subsequent attempts, Dr. de Leon has repeatedly failed the examination for board certification. In 1984, he scored in the 9th percentile; in 1985, he scored in the 7th percentile; and, in 1986, he again scored in the 7th percentile. A doctor designated as an expert by plaintiff has stated that even if de Leon took a full year or more off to study, it is highly doubtful that he

Dr. Macon wrote a letter to the Credentials Committee reviewing de Leon's performance as a resident, as a house officer, and on the various objective examinations. Dr. Macon concluded that Dr. de Leon's credentials were unsatisfactory and recommended that his application be denied.

On July 16, 1984, the Credentials Committee met and considered Dr. de Leon's application. In accordance with Dr. Macon's recommendation, the Credentials Committee voted to recommend that Dr. de Leon's credentials be designated as unsatisfactory. As specified in the Hospital's by-laws, this negative recommendation concerning Dr. de Leon's

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would ever pass the examination for board certification.

application was forwarded in turn to the Hospital's Medical Executive Committee, to the Board of Trustees' Medical Staff Privileging Committee, and finally to the full Board of Trustees of St. Joseph Hospital (hereinafter "the Board"). Each of these bodies examined the record before it and determined that Dr. de Leon's credentials were unsatisfactory. The Board of Trustees accordingly voted on September 27, 1984 to deny Dr. de Leon's application. Dr. de Leon was advised of the Board's decision on October 17, 1984.

Although Dr. de Leon did not appeal the Board's determination within the 14 days specified in the Hospital's bylaws, the Board, pursuant to a stipulation reached with counsel for Dr. de Leon, agreed to hear Dr. de Leon's appeal in

any event. An Ad Hoc Committee of the Board was appointed to consider the matter, and a hearing was held on August 27, 1985. The Committee, however, did not reach a decision on the evidence presented to it at this initial hearing. In a letter to counsel for de Leon dated September 5, 1985, the Chairman of the Committee stated that the Committee was "satisfied with Dr. De Leon's credentials . . . through the conclusion of his residency," but did not "believe that it has received sufficient information about Dr. De Leon from the expiration of his residency through the current time." Accordingly, the Committee, was reformed with new members added, and additional evidentiary hearings were held on December 16 and December 19, 1985. At these hearings, de Leon was accorded the

full panoply of due process rights. His counsel was given de Leon's credentials file; the testimony of witnesses was presented, and his attorney cross-examined witnesses on de Leon's behalf. Following the hearings, the Ad Hoc Committee allowed de Leon to submit supplemental written argument.

On February 12, 1986, the Ad Hoc Committee met and issued an 11-page (single-spaced) report recommending to the Board that Dr. de Leon's application for privileges be denied. The Ad Hoc Committee thoroughly reviewed plaintiff's background and training as compared with those of other applicants who had been granted privileges. The report detailed this review and noted:

> The Committee does not find that the prior privileging of general surgeons is reflective of any pattern that reveals any

> unfairness or unreasonableness when considered with reference to Dr. De Leon's background and evaluations. Report at 7.

The Committee also carefully considered Dr. de Leon's charges of bias against Dr. Macon, and found them to be without a factual basis:

> Given the number of adverse facts which are conceded or not contested by Dr. De Leon and with which Dr. Macon is not involved or as to which Dr. Macon's statements are not questioned, the Committee is puzzled as to this emphasis on the part of Dr. De Leon. Nevertheless, the Committee finds that there is no basis for any finding that Dr. Macon acted improperly; without any factual basis; or in any way that reflects bias or in any "reprehensible" way. The Committee notes that Dr. De Leon feels that his misfortunes are the result of dislike or adverse bias on the part of others. Id. at 8.

On the crucial issue of Dr. de Leon's own behavior, the Committee

concluded:

> The Committee finds that Dr. De Leon's conduct and attitude towards the Hospital and those of its physicians placed in positions of administrative authority with regard to his conduct, is improper and without justification. Id. at 10.

As a result of its findings, the Committee unanimously voted that Dr. de Leon's application should be denied and that this recommendation should be presented to the full Board.

The report was forwarded to counsel, who were permitted to submit written supplemental and rebuttal argument to the full Board before it formally considered Dr. de Leon's appeal. Nearly all of the contentions made by plaintiff in this suit were also previously advanced before the various deliberative bodies of the Hospital which had considered his request

for privileges.

On May 22, 1986, the full Board met and again considered Dr. de Leon's application for privileges. Once again, the Board voted to deny the application. That same day, plaintiff filed this suit in this Court.

II

Summary Judgment Principles

In their motion, defendants seek summary judgment as to all claims asserted against them by plaintiff. It is well settled that a defendant moving for summary judgment has the burden of showing that no genuine issue of material fact exists and that he is entitled to judgment as a matter of law. Rule 56(c), F.R.Civ.P.; see also Barwick v. Celotex Corp., 736 F.2d 946, 958 (4th Cir. 1984). This burden may be met by consideration

of affidavits, exhibits, depositions and other discovery materials. Id.

One of the purposes of Rule 56 is to require a plaintiff, in advance of trial and after a motion for summary judgment has been filed and supported, to come forward with some minimal facts to show that a defendant may be liable under the claims alleged. See Rule 56(e). Moreover, "'[a] mere scintilla of evidence is not enough to create a fact issue: there must be evidence on which a jury might rely.'" Barwick, supra, 736 F.2d at 958-59 (quoting Seago v. North Carolina Theaters, Inc., 42 F.R.D. 627, 640 (E.D.N.C. 1966), aff'd, 388 F.2d 987 (4th Cir. 1967)). In the absence of such a minimal showing, a defendant should not be required to undergo the considerable expense of preparing for and partici-

pating in a trial. As Chief Judge Winter said in Bland v. Norfolk and Southern Railroad Company, 406 F.2d 863, 866 (4th Cir. 1969):

> While a day in court may be a constitutional necessity when there are disputed questions of fact, the function of a motion for summary judgment is to smoke out if there is any case, i.e.. any genuine dispute as to any material fact, and, if there is no case, to conserve judicial time and energy by avoiding an unnecessary trial and by providing a speedy and efficient summary disposition.

In two recent cases, the Supreme Court has had an opportunity to clarify and expand the principles applicable to a trial court's consideration of a summary judgment motion filed under Rule 56. Anderson v. Liberty Lobby, 106 S.Ct. 2505 (1986); Celotex Corp. v. Catrett, 106 S.Ct. 2548 (1986).

In Anderson, the Supreme Court held

that the standard for granting a summary judgment motion under Rule 56 is the same as that for granting a directed verdict under Rule 50, F.R.Civ.P. 106 S.Ct. at 2511-12. The Court explained this standard as follows:

> [T]he judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

Id. at 2512 (emphasis added).

In Catrett, the Court held that there is—"no express or implied requirement in Rule 56 that the moving party support its motion with affidavits or other similar materials negating the

opponent's claim." 106 S.Ct. at 2553 (emphasis in original). In reaching this result, the Court observed:

> Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed "to secure the just, speedy and inexpensive determination of every action." Fed. Rules Civ.P. 1; see Schwarzer, Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact, 99 F.R.D. 465, 467 (1984). . . . Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate in the manner provided by the Rule, prior to trial, that the claims and defenses have no factual basis.

Id. at 2555.

The Fourth Circuit recently discussed in Felty v. Graves-Humphrey

Co., 818 F.2d 1126 (4th Cir. 1987), the Supreme Court's holdings in Anderson and Catrett. Judge Wilkinson emphasized in Felty that trial judges have "an affirmative obligation . . . to prevent 'factually unsupported claims and defenses' from proceeding to trial." Id. at 1128 (quoting Celotex, supra, 106 S.Ct. at 2553).

Applying these principles to the facts of record here, this Court concludes that defendants' motion for summary judgment must be granted.

III

Discussion

In his complaint, plaintiff asserts claims for damages against the Hospital for breach of contract, defamation and

interference with economic advantage.[3] Plaintiff also asserts claims against Dr. Macon for interference with economic relations and defamation. As noted, compensatory and punitive damages as well as injunctive relief are sought.

The essential thrust of all of Dr. de Leon's claims in this suit is that the Hospital wrongfully denied his application for staff privileges, due largely to Dr. Macon's bad faith, and that both

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[3] In a proposed amended complaint, plaintiff asserted a second breach of contract claim against the Hospital, one purportedly based on Jacques v. First National Bank of Maryland, 307 Md. 527 (1986). On November 13, 1987, this Court denied plaintiff's motion for leave to amend his complaint as being untimely. Even had plaintiff been allowed leave to amend, this Court concludes that the Jacques case is not relevant to the issues presented here. That case involved a bank's allegedly negligent processing of a mortgage application.

defendants defamed him in the process. This Court would first note that courts in Maryland and elsewhere have been extremely reluctant to review the merits of decisions of hospital boards relating to the granting of privileges, and have deferred such matters to the expertise of medical professionals. See Levin v. Sinai Hospital, 186 Md. 174, 179-80 (1946). In that case, a doctor sued a hospital which had denied him full staff privileges. In affirming the trial court's order sustaining the hospital's demurrer, the Court of Appeals of Maryland concluded:

> We hold that a private hospital has the right to exclude any physician from practicing therein, and such exclusion rests within the sound discretion of the managing authorities . . . . A private hospital is not under a common law duty to serve everyone who applies for treatment or permission to

> serve. In the absence of statute, it may accept some applicants and reject others. Likewise, the directors of a private hospital corporation having power to appoint members of its medical staff, have the authority to remove them from the staff. It has never been the policy of the State of Maryland to interfere with the power of the governing body of a private hospital to select its own medical staff. 186 Md. at 179-80 (citations omitted).

Courts in other jurisdictions have similarly recognized that hospitals have broad discretion in the selection of their medical staffs. See, e.g., Khan v. Suburban Community Hospital, 340 N.E.2d 398, 402 (Ohio 1976); Huffaker v. Bailey, 540 P.2d 1398, 1399-1400 (Ore. 1975). In this particular case, this Court accordingly concludes that it is not its function to determine whether the Hospital's decision was the correct one, but merely

to determine whether plaintiff can point to some factual or legal basis which would permit the Hospital's decision to be reviewed at trial. See Levin, supra, 186 Md. at 179-81. On the present record, this Court concludes that plaintiff has failed to establish a triable issue of fact under any of the legal theories advanced.

(a)

The Release

Although the Court will discuss plaintiff's various theories of recovery separately, it is clear that the release which de Leon executed by itself bars all of his claims. Under Maryland law, absent circumstances not present here, parties may validly exculpate themselves from liability for anything short of "willful, wanton, reckless or gross

conduct." Boucher v. Riner, 68 Md. App. 539, 543 (1986) (citing Winterstein v. Wilcom, 16 Md. App. 130, 134-36 (1972)). Plaintiff does contend that defendants here willfully intended to inflict injury. However, there is no support whatsoever in the present record for this contention.

On the contrary, it appears that the Hospital bent over backwards to allow Dr. de Leon every opportunity to prove that his credentials were satisfactory. As noted, the Ad Hoc Committee of the Board allowed de Leon on two separate occasions to present witnesses and evidentiary materials in support of his application. The sessions were lengthy ones, and plaintiff's arguments in support of his application for privileges were fully considered by the Committee. From this

Court's review of the transcripts of those hearings, it is clear that the members of the Committee approached Dr. de Leon's application with an open mind. In fact, the record shows that Dr. Macon, who was the source of much of the negative information about plaintiff, was sharply questioned. The record here is devoid of evidence indicating any willful or reckless conduct on the part of the Committee or Dr. Macon which led to the denial of plaintiff's application.

Plaintiff has sought to relitigate in this Court each and every controverted incident discussed before the various Hospital bodies that considered his application. Such relitigation is unwarranted not only because the Hospital treated de Leon's application fairly and fully, but also because plaintiff would

not prevail even were such relitigation to be permitted.

On the present record, it is apparent that Dr. de Leon's abilities as a surgeon are at best marginal, and that he lacks the dedication and sensitivity required to be a competent physician. As noted, Dr. de Leon was asked, because of his inadequate performance, to leave another residency program even before he came to St. Joseph's Hospital. Although he managed to complete his residency training at the Hospital, at least one doctor thought that even his performance as a resident was substandard and voted not to allow him to continue in the program. Even those doctors whose evaluations supported the granting of privileges termed his abilities as being merely average. In their deposition

testimony, these doctors further noted that they had had little contact with de Leon following the completion of his residency, and thus they were unaware of how he had performed as a house officer.

Whatever weight in his favor might be afforded the evaluations of Dr. de Leon as a resident is clearly overcome by the ample evidence concerning his unsatisfactory performance as a house officer.[4] The contemporaneous documentary evidence and the deposition testimony of the many doctors and nurses who had contact with Dr. de Leon while he was a house officer corroborate that his

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[4] Plaintiff's own affidavit submitted in opposition to the pending motion indicates that he was recently fired from a medical job he held while maintaining this suit against the Hospital.

performance was patently deficient. As noted, there were numerous instances when Dr. de Leon could not be located when he was on call, or when he simply refused to see patients whom he was contractually and morally bound to treat.

Testimony before the Committee indicated that Dr. de Leon was consistently rude to nurses at the Hospital, and that he often tried to pass the buck for his duties to other doctors. The negative evaluation made by the Hospital concerning Dr. de Leon's abilities is further supported by his extremely poor performance on objective examinations. As noted, Dr. de Leon, on four separate occasions, has not come even close to passing the American Board of Surgery's examination for board certification. On the last three

occasions, each time he scored in the bottom 10 percent of all those taking the examination.

In a desperate effort to uncover evidence which might support his claims, plaintiff has in this Court employed a strategy of deposing nearly every one who had any contact with him while he worked at the Hospital. This approach, however, has been completely unsuccessful in uncovering evidence favorable to plaintiff. A review of the transcripts of the many depositions taken in this case serves instead to support the findings of the Ad Hoc Committee and, in fact, even to disclose many instances of misconduct and incompetence not presented to the Committee.

In the face of this massive body of evidence, plaintiff relies almost

exclusively on his own testimony by way of explanation or denial. Plaintiff's self-serving and conclusory versions of events and his ascriptions of motive were previously presented to the various Hospital bodies that considered his application and were found by them to be wanting. Plaintiff nevertheless insists on the basis of his own testimony and the record here that he is entitled to present to a jury his claim that the Hospital's action in denying him privileges amounted to willful, reckless or gross conduct. The Fourth Circuit, however, has repeatedly ruled that the party opposing a properly supported motion for summary judgment must produce specific facts showing that there is a genuine issue for trial, and that "[u]nsupported allegations as to motive

do not confer talismanic immunity from Rule 56." Ross v. Communications Satellite Corp., 759 F.2d 355, 365 (4th Cir. 1985).

Plaintiff has failed in this case to point to specific facts that would establish extreme or wanton conduct on the part of defendants. Accordingly, there is no basis for invalidating the release de Leon signed when he applied for privileges. See King v. Bartholomew County Hospital, 476 N.E.2d 877, 879 (Ind. 1985) (hospital board could lawfully require applicants for privileges to sign a release granting the hospital and others assisting in the review process absolute immunity). All of plaintiff's claims are accordingly barred by the release which was executed by Dr. de Leon.

(b)

Breach of Contract

Even assuming that the release was invalid for some reason, plaintiff's underlying claims would still present no triable issue of material fact. Plaintiff has asserted a claim of breach of contract against the Hospital. Plaintiff contends that the Hospital was contractually obligated to grant staff privileges to every applicant who had completed the Hospital's residency program and who presented credentials consisting of: (1) eligibility to take the examination for board certification; (2) training in a specialty; (3) two letters of recommendation; and (4) a license from the State of Maryland. There is no basis in law or fact for this somewhat surprising contention.

First, factually, none of the documents plaintiff cites as establishing the terms of the purported contract supports in any way such an automatic entitlement to privileges. The Hospital's by-laws specifically provide that "membership on the medical staff . . . is a privilege which may be extended only to professionally competent physicians . . . who continuously meet the qualifications, standards and requirements set forth in these by-laws." Indeed, the Hospital's complex application and appeal process for the granting of privileges indicates that the credentials of each applicant are to be carefully examined on a case-by-case basis.

Second, legally, any such contract of the sort claimed by plaintiff to exist in this case would be void as against

public policy. By statute, Maryland imposes a legal duty upon hospitals to investigate the credentials and qualifications of a physician applying for staff privileges. See Md. Health-General Code Ann. § 19-319(e) (1987). There are numerous decisions from other jurisdictions imposing liability on hospitals for a patient's injury due to a physician's malpractice because the hospital negligently investigated the physician's credentials. See e.g., Johnson v. Misericordia Community Hospital, 301 N.W.2d 156, 164 (Wis. 1981) (hospital had duty to investigate applicant's creden-tials, and to solicit information from doctors familiar with the applicant's work, including those not given as references by the applicant); see also Mitchell County Hospital

Authority v. Joiner, 189 S.E.2d 412, 414 (Ga. 1972); Pedroza v. Bryant, 677 P.2d 166, 169-71 (Wash. 1984). As a matter of law, this Court concludes that Dr. de Leon had no automatic entitlement to staff privileges at the Hospital.

For these reasons, plaintiff cannot prevail on his claim of breach of contract.

(c)

Defamation

Plaintiff has also alleged claims of defamation against both the Hospital and Dr. Macon. Plaintiff's claim against Dr. Macon is based upon written and oral remarks made by Dr. Macon during the application process. Plaintiff's claim against the Hospital is based merely upon the fact of the denial of privileges. To state a viable claim for defamation,

plaintiff must establish the following elements:

> (a) a false and defamatory statement concerning another;
> (b) an unprivileged publication to a third party;
> (c) fault amounting to at least negligence on the part of the publisher; and
> (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.

Restatement (Second) of Torts § 558 at 155 (1977); see also Jacron Sales Co. v. Sindorf, 276 Md. 580, 596-97 (1976); Mareck v. Johns Hopkins University, 60 Md. App. 217, 223 (1983), cert. denied, 302 Md. 288 (1985).

The defamation claim against the Hospital is insufficient, inter alia, because there has been no publication. Dr. de Leon concedes that the Hospital itself has not published its decision

denying him privileges, but argues that, in applying for privileges at other hospitals, he himself will be compelled to make this fact known. Relying on Lewis v. Equitable Life Insurance Society, 389 N.W.2d 876, 886-88 (Minn. 1986), plaintiff argues that such "self-compelled, self-publications" can form the basis for an actionable defamation claim.

Lewis, however, is a recent and novel decision which has not been generally followed and which has been criticized. See Sarratore v. Longview Van Corp., 666 F. Supp. 1257, 1263-64 (N.D. Ind. 1987). The Restatement (Second) of Torts explicitly rejects the "self-publication" theory, Id. § 577 at 206, and plaintiff has cited no Maryland authority in accord with Lewis. This

Court concludes that the Court of Appeals of Maryland would not follow Lewis, particularly on this record.

The defamation claim against Dr. Macon has even less merit. During the entire application process Dr. Macon acted in his capacity as a Hospital official, and all the allegedly defamatory statements were made by him to other Hospital officials. Thus, again, none of the statements relied upon have been published to a legally distinct third party.

Moreover, even assuming such intra-corporate communication could constitute a publication, Dr. Macon's statements were privileged under Maryland law. See Md. Health Occ. Code Ann. §§ 14-601 & 14-603 (1986 & 1987 supp.). On the present record, plaintiff has made no

showing of bad faith or malice on the part of Dr. Macon sufficient to overcome this qualified privilege. In construing analogous claims of privilege in other jurisdictions, courts have regularly granted judgment in favor of defendants under similar circumstances. See, e.g., Hayden v. Bracy, 744 F.2d 1338, 1343-44 (8th Cir. 1984); George v. Hilaire Farm Nursing Home, 622 F. Supp. 1349, 1355 (S.D.N.Y. 1985); Kinney v. Daniels, 574 F. Supp. 542, 546-47 (S.D. W.Va. 1983).

Finally, in the context of the entire record, none of Dr. Macon's statements were defamatory. Many of the statements were merely expressions of Dr. Macon's opinion, which he clearly labelled as such. See Potomac Valve and Fitting, Inc. v. Crawford Fitting Co., 829 F.2d 1280, 1286 (4th Cir. 1987)

(First Amendment protects statements of opinion from liability under state defamation law). Moreover, where Dr. Macon reported factual incidents that Dr. de Leon denied, Dr. Macon consistently noted de Leon's denial or explanation.

For these reasons, plaintiff's claims of defamation must also fail.

(d)

Intentional Interference With Economic Advantage or Economic Relations

Even less meritorious are plaintiff's claim asserted against the Hospital of intentional interference with economic advantage and his claim against Dr. Macon of intentional interference with economic relations. Both claims involve allegations of intentional torts, whereby plaintiff is required to establish that defendants' actions were

performed in bad faith and were calculated to cause damage to plaintiff. See Natural Design, Inc. v. Rouse Co., 302 Md. 47, 70-71 (1984); see also Robinson v. Magovern, 521 F. Supp. 842, 926 (W.D. Penn. 1981), aff'd. 688 F.2d 824 (3d Cir.), cert. denied, 459 U.S. 971 (1982). As noted herein, plaintiff has failed to establish a triable issue of fact as to whether any of defendants' actions were undertaken in bad faith. Plaintiff's bald self-serving assertions to the contrary, which have no support in the entire extensive record, are insufficient to meet the requirements of Rule 56. See Ross, supra, 753 F.2d at 365.

Moreover, Dr. Macon acted as a Hospital official when committing the allegedly tortious acts. As a Hospital official, Dr. Macon was a party to Dr. de

Leon's contractual relationship with the Hospital. Thus, Dr. Macon cannot be held liable for intentionally interfering with that contract. See Buckner v. The Lower Florida Keys Hospital District, 403 So.2d 1025, 1028 (Fla. App. 1981), cert. denied, 412 So.2d 463 (Fla. 1982).

For all these reasons, defendants' motion for summary judgment will be granted. An appropriate Order will be entered today.

/s/
Chief, United States District Judge

DATED: March 3, 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

JOSE F. DE LEON, M.D., et al. *

Plaintiffs *

vs.

* CIVIL NO. H-86-1609

SAINT JOSEPH HOSPITAL, INC., et al. *

Defendants *

* * *

O R D E R

For the reasons stated in this Court's Memorandum Opinion filed herein today, it is this 3rd day of March, 1988, by the United States District Court for the District of Maryland,

ORDERED:

1. That defendants' motion for summary judgment be and the same is hereby granted; and

2. That judgment is hereby entered in favor of defendants, with costs.

/s/
Alexander Harvey, III
Chief, United States
District Judge

MURNAGHAN, Circuit Judge:

Once again this court must consider a medical doctor's attempt by an action for defamation to counter a hospital's denial of staff privileges. See Sibley v. Lutheran Hospital, ___ F.2d ___ (4th Cir. 1988). Once again we find the effort futile.

Jose S. De Leon, M.D., a surgeon, completed his residency at St. Joseph's Hospital in Baltimore, Maryland and was subsequently employed by it on a contractual basis as a "house surgeon." De Leon applied for admitting privileges at the hospital, but was rejected. He then filed suit against the hospital and Dr. William Macon, its Chief of Surgery, in the United States District Court for the District of Maryland, alleging breach of contract, defamation, tortious

interference with prospective advantage and loss of consortium. On March 3, 1988, Judge Alexander Harvey, II entered summary judgment for the defendants on all claims. De Leon has appealed the grant of summary judgment on the defamation claim.

I.

De Leon, a Filipino national, received his medical degree from the University of the Philippines in 1970. He performed a general surgical residency at the Philippines General Hospital Medical Center from 1970 until 1975. In 1976 he emigrated to the United States. De Leon underwent a one-year fellowship at the Texas Heart Institute and an internship and residency at the Brooklyn-Cumberland Medical Center from 1977 to 1979. De Leon then transferred to the

Pennsylvania College of Medicine for his second year of residency. Due to poor performance, he was not reappointed to a third year residency and was forced to apply elsewhere.

Although De Leon submitted numerous applications, St. Joseph Hospital (the Hospital) was the only institution willing to accept him at a third year level (the others required him to repeat his second year). De Leon completed his third, fourth and fifth (final) years of residency at St. Joseph. He was then hired by St. Joseph on a contractual basis as a "house surgeon" for the period of July 1, 1983 to June 30, 1984. A "house surgeon" could not admit patients to the hospital and was required to treat patients only under the supervision of

another physician.[1]

In January of 1984 De Leon applied for medical privileges that would allow him to admit patients to the Hospital. As part of the application, De Leon signed a release absolving the Hospital, its agents and others, including those providing information to the hospital, from civil liability connected with the application process.

Pursuant to the Hospital's Bylaws, De Leon's application was forwarded to the Credentials Committee, consisting of seven appointed and elected members. Appraisal forms were sent out to De Leon's references and his previous employers. Macon, the head of surgery,

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[1] De Leon's contract was subsequently renewed for an additional year, but was not completed.

was required to assess De Leon's qualifications. Macon supervised the house surgeons and was in a position to evaluate De Leon's medical skills.

Macon submitted a letter concerning De Leon's qualifications to the Credentials Committee. Macon concluded De Leon's qualifications were unsatisfactory and recommended that his application be denied.[2] The district court summarized De Leon's credentials as follows:

> Dr. Macon had received numerous complaints concerning Dr. de Leon's failures to show up for

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[2] The voluminous record is replete with references to De Leon's medical abilities and work conduct. Upon reviewing the record, it appears clear that De Leon is at best a mediocre physician. A fair reading of the record would put him considerably below even that minimum threshold. It is also clear that, in the abstract, the hospital was justified in denying him credentials.

his required duties, concerning his refusals to see patients when requested to and concerning his unavailability on numerous occasions when he was "on call."

Dr. de Leon's abilities as a surgeon were also questionable. One doctor who had supervised him during his residency had commented on his extreme hesitancy and nervousness during surgery. Another doctor who had supervised Dr. de Leon had, in fact, voted against permitting de Leon even to continue his residency because of doubts about his competency. These subjective impressions were confirmed by Dr. de Leon's performance on objective tests. During his residency at the Brooklyn-Cumberland Medical Center, he scored in the 21st percentile on the In-Training Examination. During his residency at the Hospital, he scored in the 11th percentile in a similar test. Moreover, he failed the American Board of Surgery's examination for board certification in 1983, scoring in the 17.6 percentile.

On July 16, 1984, the Credentials Committee met and considered De Leon's application. The Committee found De

Leon's credentials to be unsatisfactory. Pursuant to the Hospital Bylaws, the negative recommendation was forwarded to the Hospital's Medical Executive Committee, to the Board of Trustees Medical Staff Privileging Committee and finally to the full Board of Trustees of St. Joseph Hospital (the Board). Each body reviewed the record and independently determined De Leon's credentials were unsatisfactory. On September 27, 1984, the Board voted to deny De Leon's application.

De Leon appealed the Board's decision.[3] An Ad Hoc committee of the Board was formed to hear De Leon's

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[3] De Leon did not appeal within the 14 days specified in the Hospital's Bylaws. Nevertheless the Board, pursuant to a stipulation reached with counsel, agreed to hear De Leon's appeal.

appeal. A hearing was held on August 27, 1985, but the committee did not reach a decision.[4] The committee was reformed and additional hearings were held on December 16 and 19, 1985. At the hearings, the district judge found:

> De Leon was accorded the full panoply of due process rights. His counsel was given De Leon's credentials file; the testimony of witnesses was presented, and his attorney cross-examined witnesses on de Leon's behalf. Following the hearings, the Ad Hoc committee allowed de Leon to submit supplemental written argument.

On February 12, 1986, the Ad Hoc committee issued an 11-page report recommending De Leon's application be

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[4] The committee felt it was "satisfied with Dr. De Leon's credentials . . . through the conclusion of his residency," but did not "believe that it has received sufficient information about Dr. De Leon from the expiration of his residency to the current time."

denied. De Leon's counsel was permitted to submit written supplemental and rebuttal argument to the full Board. On May 22, 1986, the full Board met, considered De Leon's appeal, and voted to deny the application.

That day, De Leon filed suit in the United States District Court for the District of Maryland. De Leon sued the hospital for breach of contract, defamation and interference with economic advantage. De Leon also sued Macon for interference with economic relations and defamation. The complaint also contained a derivative claim for loss of consortium on behalf of De Leon's wife. De Leon sought injunctive relief, compensatory and punitive damages.

Ample discovery was conducted by both sides, including over twenty

depositions.[5] Motions for summary judgment were filed on behalf of the defendants. Lengthy memoranda and numerous exhibits were submitted by both sides. Oral argument was heard on February 19, 1988. Thereafter, Judge Harvey granted summary judgment for the defendants on all counts. De Leon appealed.[6]

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[5] The district court, in its opinion, observed:

> In a desperate effort to uncover evidence which might support his claims, plaintiff has in this court employed a strategy of deposing nearly everyone who had any contact with him while he worked at the Hospital. This approach, however, has been completely unsuccessful in uncovering evidence favorable to the plaintiff.

[6] De Leon has only raised on appeal the grant of summary judgment on the defamation counts.

De Leon contends that the trial court erred in granting summary judgment to the defendants St. Joseph Hospital and Macon on the defamation counts. An appellate court normally reviews a grant of summary judgment de novo, applying the same standard as the district court. Felty v. Graves-Humphreys Co., 818 F.2d 1126, 1128 (4th Cir. 1987).

The defendants, in moving for summary judgment, have the burden of showing that no genuine issue of material fact exists and that they are entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Barwick v. Celotex Corp., 736 F.2d 946, 958 (4th Cir. 1984). As the district court correctly identified, this burden may be met by the use of "affidavits, exhibits, depositions and other discovery materials." Barwick, 736

F.2d at 958. Once a defendant has met this burden, the plaintiff must go forward and produce sufficient evidence to support his contentions. "A mere scintilla of evidence is not enough to support a fact issue; there must be evidence on which a jury might rely." Barwick, 736 F2d at 958-59 (quoting Seago v. North Carolina Theaters, Inc., 42 F.R.D. 627, 640 (E.D.N.C. 1966), aff'd, 388 F.2d 987 (4th Cir. 1967), cert. denied, 390 U.S. 959 (1968)).

The standard for granting summary judgment is akin to that of granting a directed verdict:

> [T]here is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. If the evidence is merely colorable or is not significantly probative, summary judgment may be granted. . . . [T]he judge must ask himself not whether he thinks

> the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented. The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-252 (1986) (citations deleted).

The proper analysis, therefore, is not simply whether there were disputed issues of fact; clearly De Leon has met that simple burden. "Only disputes over facts that might affect the outcome of the suit under the governing laws will properly preclude the entry of summary judgment." Anderson, 477 U.S. at 248. Even after considering the record in the light most favorable to De Leon, we are unable to detect any issue of fact

relevant to the disposition of the case that would preclude the defendants from judgment as a matter of law.[7]

II.

The district court based its grant of summary judgment on four major points:

> (1) De Leon's claims were barred by a release executed by him at the time of his applica-

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[7] Although the district court did not address it, Anderson, supra, mandates that a motion for summary judgment "necessarily implicates the substantive evidentiary standard of proof that would apply at a trial on the merits." 477 U.S. at 252. Here, as in Anderson, this court is dealing with a defamation claim involving conditionally privileged material (whether by statute or common law). New York Times malice must be shown by clear and convincing evidence. Harnish v. Herald Mail Co., 264 Md. 326, 335-36, 286 A.2d 146, 152 (1972). Cf. New York Times Co. v. Sullivan, 376 U.S. 254 (1964); Jacron Sales Co. v. Sindorf, 276 Md. 580, 597-601, 350 A.2d 688, 698-700 (1976). The judge must consider the evidentiary burden the plaintiff must meet before sending the case to the jury. Under this heightened scrutiny, De Leon's case appears even more flimsy.

tion for admitting privileges.

> (2) De Leon's claims were legally insufficient because there has been no publication of the allegedly defamatory material.
>
> (3) Even if defamatory, Macon's statements were privileged under Maryland law.
>
> (4) The statements were not defamatory.

If even one of the above contentions is correct, the grant of summary judgment is proper. We address each point in the sequence adopted by the district court.

A.

In connection with his application for admitting privileges, De Leon executed a release agreement providing:

> I hereby authorize Saint Joseph Hospital, Inc. to consult with administrators and members of the Medical Staff of other hospitals or Institutions with which I have been associated and with others, including past and present malpractice carriers, who may have information bearing

on my professional competence, character and ethical qualifications. I consent to the inspection of all documents and data, including Medical Records at other hospitals and other sources of available data, that may be material to any evaluation of my professional qualifications and competence to carry out the clinical privileges requested, my pattern of practice, as well as my physical and mental health status and moral and ethical qualifications for Medical Staff membership.

I release Saint Joseph Hospital, Inc., its agents, servants, employees and staff members from liability for all acts performed in connection with evaluating my application and my credentials, qualifications and practices, and I release from liability any and all individuals and organizations who provided information to Saint Joseph Hospital, Inc. concerning my professional competence, medical practice patterns, ethics, character, and other qualifications for staff appointment and clinical privileges. I consent to the release of such information, including otherwise privileged or confidential information to Saint Joseph Hospital, Inc.

The district court found the release a bar to all of De Leon's claims. The court correctly recognized that, "[u]nder Maryland law, absent circumstances not present here, parties may validly exculpate themselves from liability for anything short of 'willful, wanton, reckless or gross conduct'" (quoting Boucher v. Riner, 68 Md. App. 539, 543, 514 A.2d 485, 488 (1986)). The court found De Leon failed to point to specific facts that would establish "extreme or wanton conduct" on the part of the defendants.

De Leon argues that Macon, by making allegedly malicious and intentionally false statements to the Board and Committees considering De Leon's applica-

tion,[8] and the Hospital, by intentionally denying De Leon's application on the basis of such statements, are each guilty of such willful and wanton conduct that the release is no longer effective. In illustration, De Leon has proceeded, to paraphrase the district court, to attempt to relitigate every allegation discussed before the various hospital bodies that considered his applications. The dis-

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[8] Expressions of opinion, of course, are protected speech under the First Amendment. De Leon alleges Macon supported his opinions about De Leon with written and other statements of fact that he knew to be false or made them with reckless disregard for their truth. De Leon also stated that Macon acted without good faith and with the intent to harm him. Thus, De Leon concludes, Macon has forfeited any immunity granted by the release (and, in addition, any statutory or common law privilege). The district court, with justification, however, failed to find any facts demonstrating extreme or wanton conduct, or bad faith or malice on the part of Macon.

trict court correctly refused to review the "correctness" of the hospital's decision.[9] Thus, the sole task for this court is to determine if De Leon has

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[9] Courts have been reluctant, and with good reason, to intervene in any hospital credentialing process. Public policy concerns obviously weigh heavily towards leaving such determinations to the hospitals themselves. In Levin v. Sinai Hospital, 186 Md. 174, 46 A.2d 298 (1946), a doctor sued a hospital which refused him full staff privileges. The court found for the hospital, concluding:

> We hold that a private hospital has the right to exclude any physician from practicing therein, and such exclusion rests within the sound discretion of the managing authorities . . . . A private hospital is not under a common law duty to serve everyone who applies for treatment or permission to serve. In the absence of statute, it may accept some applicants and reject others. Likewise, the directors of a private hospital corporation having power to appoint members of its medical staff, have the authority to remove them from the staff. It has never been the policy of the State of Maryland to interfere with the power of the governing body of a private hospital to select its own medical staff. 186 Md. at 179-80, 46 A.2d at 301 (citations omitted).

established a factual or legal basis for reviewing the Hospital's decision at trial. The district court concluded that De Leon "failed to establish a triable issue of fact under any of the legal theories advanced. The legal theories advanced on appeal are no more meritorious.

As a prime example, De Leon alleged that Macon made the following seven false statements, and also alleged facts from which he claimed the jury could have inferred that Macon had known of their falsity and that further reflected his bad faith and intent to harm.

> (1) "There have been complaints from other physicians that Dr. De Leon has not been of good assistance to them in the Operating Room."

De Leon has alleged that, to back the statement up, Macon could supply only

one physician's name--that of Dr. John E. Miller, who in actual fact recommended De Leon favorably. However, Macon also discussed the complaints of a Dr. Roberto Ferrer. Furthermore, Miller's deposition and appraisal form do not support De Leon's assertion. In his deposition, Miller recalled communicating to Macon a problem with De Leon during operations, a "disturbing" tendency during most operations to crack under pressure. Miller gave as an answer:

> A: When you reached a critical area in the operation, which the risk was high, he had a tendency to start to cough which became increasingly to the point that it was almost like he was choking on his saliva, and all this meant was that this was tension.

Miller further stated that he indicated this obliquely on his appraisal by writing "no vascular," which of the

procedures requested by De Leon involved high tension.

> (2) "De Leon had refused to respond to an elderly patient who had fallen and injured his head and was complaining of chest pains, thereby contributing to the patient's death."

Macon stated that it was reported to him that De Leon had refused to see the patient. There is no question that it was. To escape the consequence of that fact, De Leon has quibbled as to the exact problems with the patient, implying Macon had access to the chart and knew the patient had no head injury or chest pains at the time.

The Head Nurse's report to Macon of the incident clearly shows, however, that the patient struck his head and was complaining of chest pain. The report also indicates De Leon's refusal to see

the patient.[10]

(3) "De Leon was given credit for his residency training."

From that De Leon reasons that Macon meant De Leon did not satisfactorily complete his training and was not a competent resident. A reasonable jury could not have drawn the inference that "given credit for completing residency at St. Joseph" meant that De Leon did not satisfactorily complete the residency. He

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[10] Despite De Leon's implications, evidence of what a publisher could have known had he investigated further is not relevant to defeating a conditional privilege. See A. S. Abell Co. v. Barnes, 258 Md. 56, 78-79, 265 A.2d 207, 220-21 (1970), cert. denied, 403 U.S. 921 (1971); Happy 40, Inc. v. Miller, 63 Md. App. 24, 36-38, 491 A.2d 1210, 1216-17, cert. denied, 304 Md. 299, 498 A.2d 1185 (1985). See also Kapiloff v. Dunn, 27 Md. App. 514, 540, 343 A.2d 251, 269 (1975), cert. denied, 426 U.S. 907 (1976) (holding "failure to investigate cannot satisfy the constitutional test of reckless disregard).

literally was given credit for completing his residency at St. Joseph.

> (4) "Dr. De Leon failed to respond to emergencies."

De Leon has referred to Macon's appraisal form, wherein Macon checked "yes" in answer to a question asking if there had been "instances when this physician failed to respond to emergencies." In the space provided for comment, however, Macon wrote "According to Nurse Practitioners."

A nurse practitioner had, indeed, reported De Leon's failure to respond. Furthermore, the record is replete with references to complaints by nurses concerning De Leon, one at least referring to failure to respond to an emergency.

> (5) "Two appraisals said De Leon was considerably below average."

Macon's letter accurately stated "[t]wo of the other appraisals stated that De Leon should not be accepted on the medical staff and they felt he was considerably below average and not acceptable."

> (6) "No one had been accepted for privileges who had failed part I of the boards during Dr. Macon's tenure as Chief of Surgery."

Macon did so state at his deposition, but qualified it by saying "to his knowledge." An application in the record does indicate that an individual's application for general surgery staff privileges was evidently approved, though he or she did not pass part one of the board examinations.

> (7) There were "numerous incidents" in which Dr. De Leon failed to respond to calls from nurses and physicians before December 27, 1983.

The record reveals that there clearly were many such incidents.

De Leon has proceeded to list various other "facts" and anomalies which, even if true, do not bear out his claims. A mere scintilla of evidence does not suffice to provide factual support for De Leon's claims of wanton behavior and bad faith. De Leon's "facts" are nothing more than conclusory allegations. Of the above "falsities," only one is supported <u>at all</u> and, with its accompanying qualification, is hardly dispositive. De Leon has not even approached a showing of the extreme, wanton behavior needed to disregard the release.

Aside from the lack of false statements, De Leon has failed to demonstrate

any basis for a claim of bad faith or intent. For example, his charge that Macon attempted to "get Dr. DelCarmen to change his evaluation of Dr. De Leon" is unfounded. According to DelCarmen's deposition, Macon merely asked him the not unwarranted question whether he stood by what he had written.

De Leon has sought to produce relevant evidence by pointing to the fact that Macon did not mention in his letter to the Board that three doctors supported De Leon's application. The Board had the evaluations of the three doctors, anyway, so the failure to mention hardly borders on deception, particularly as Macon was not responsible for summarizing every evaluation. Furthermore, Macon was only fulfilling his responsibilities by pointing out the unfavorable evaluations.

Negative appraisals of De Leon were entitled to greater weight in this context (particularly where even the best appraisals were "average").

De Leon resents that Macon "ridiculed" him while De Leon was assisting in surgery. Macon stated that he asked De Leon questions relating to the operation, as was his practice. De Leon could answer none of them. The practice is a normal one so, even if De Leon felt ridiculed, it was harmless since the board "accepted" De Leon's explanation that he really knew the answers, but just did not express them.

Among the other allegations and assertions produced by De Leon, we can find no basis for charges of "willful misconduct." "Unsupported allegations as to motive do not confer talismanic

immunity from Rule 56." Ross v. Communications Satellite Corporation, 759 F.2d 355, 365 (4th Cir. 1985). Without support as to intent or wantonness, the release precluded recovery on every claim De Leon has alleged.

B.

Turning to the issue of whether there was publication, to state a viable claim for defamation De Leon must establish:

> (a) a false and defamatory statement concerning another;
>
> (b) an unprivileged publication to a third party;
>
> (c) fault amounting to at least negligence on the part of the publisher; and
>
> (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.

Restatement (Second) of Torts, § 588 at

155 (1977). See Jacron Sales Co. v. Sindorf, 276 Md. 586, 596-97, 350 A.2d 688, 697-98 (1976); Mareck v. Johns Hopkins University, 60 Md. App. 217, 223, 482 A.2d 17, 20-21 (1983), cert. denied, 302 Md. 288, 487 A.2d 292 (1985).

The district court found De Leon's defamation claims insufficient, inter alia because there had been no publication of defamatory statements to a third party. The Hospital has not published its decision denying De Leon privileges. De Leon argues that he will be forced to reveal the fact of denial when applying for other positions, resulting in a compelled "self-publication." See Lewis v. Equitable Life Insurance Society, 389 N.W.2d 876, 886-88 (Minn. 1986). The theory of self-publication has not gained widespread acceptance and De Leon could

cite no Maryland authority for his proposition. On the other hand, Lewis has been subjected to some criticism. See Sarratone v. Longview Van Corp., 666 F. Supp. 1257, 1263-64 (N.D. Ind. 1987) (criticizing Lewis); Restatement (Second) of Torts § 577 at 206 (rejecting self-publication). The district court concluded that the Maryland Court of Appeals, at least on the facts presented here, would not adopt self-publication. We do also, bearing in mind that, otherwise, the theory of self-publication might visit liability for defamation on every Maryland employer each time a job applicant is rejected.

The district court also found that during the application process Macon acted solely in his capacity as a Hospital official, and all the allegedly

defamatory statements were made to other Hospital officials. Thus, the district court reasoned, there was no publication to a "legally distinct third party."

Assuming the district court was incorrect, see Hanrahan v. Kelly, 269 Md. 21, 32-37, 305 A.2d 151, 158-60 (1973); Restatement (Second) of Torts § 577, comment e, at 203, such a publication may not be actionable where a conditional privilege exists. Here, as we discuss below, Macon's communications may enjoy a qualified privilege, whether from a legal or moral duty to convey the information, or from a mutual interest of the communicator and recipient in the subject matter. See Simon v. Robinson, 221 Md. 200, 206, 154 A.2d 911, 915 (1959). A finding of conditional privilege would negate a presumption of malice and shift

the burden to the plaintiff to show actual malice. Hanrahan, 269 Md. at 29, 305 A.2d at 156.

In short, while the district court probably erred technically in granting summary judgment on the basis of no publication, there has been no actionable publication.

C.

The district court held that, "assuming such intracorporate communication could constitute a publication," Macon's statements were privileged under Maryland law. A conditional privilege protecting this type of communication exists under both statute, Md. Health Occ. Code Ann. §§ 14-601 & 14-603, and the common law. Section 14-601 provides, in pertinent part:

> (f) Immunity from civil liability. -- A person who acts

> in good faith and within the scope of jurisdiction of a medical review committee is not civilly liable for any action as a member of the medical review committee or for giving information to, participating in, or contributing to the function of the medical review committee.

Section 14-603 provides, in pertinent part:

> (c) Immunity from civil liability. -- A person described in subsection (b) of this section is not civilly liable for giving information to any hospital, hospital medical staff, related institution, or other health care facility, professional society, medical school, or professional licensing board, if the person:
>
> (1) Gives the information in good faith and with the intention of aiding in the evaluation of the qualifications, fitness, or character of a physician; and
>
> (2) Does not represent as true any matter that the person does not reasonably believe to be true.

Macon clearly is protected by the

two statutory sections. Furthermore, although the court did not address it, Macon also enjoyed the benefit of a conditional privilege at common law. Maryland recognizes that communications arising in an employment context or by common interest in the subject matter are privileged. See, e.g., General Motors Corp. v. Piskor, 277 Md. 165, 352 A.2d 810 (1976) Hanrahan v. Keily, 269 Md. 21, 305 A.2d 151 (1973); Exxon Corp. v. Schoene, 67 Md. App. 412, 508 A.2d 142 (1986). The privilege is particularly apt in the present context, since the privilege, along with others, arose by way of recognition of the desirable public benefit of encouraging uninhibited communication where a public or private duty may lie. See Simon v. Robinson, 221 Md. 200, 206, 154 A.2d 911, 915 (1959).

This concept was expressed in Hanrahan, 269 Md. at 31, 305 A.2d at 157:

> Stated in another fashion, a communication is conditionally privileged when the circumstances induce a reasonable belief that the recipient is one to whom the publisher is under a legal duty to publish the defamatory matter or is a person to whom its publication is otherwise within the general standards of decent conduct.

As Macon had a reasonably perceived duty to communicate the information he possessed to the Credentials Committee, his communications were privileged.

Once, by statute or common law, a conditional privilege has been established it must be overcome by a showing of New York Times malice. Marchesi v. Franchino, 283 Md. 131, 139, 387 A.2d 1129, 1133 (1978). See New York Times Co. v. Sullivan, 376 U.S. 254 (1964). Thus, De Leon had to show Macon knew his

statements were false or acted with reckless disregard as to their truth to escape the privilege bar. New York Times, 376 U.S. 11 at 279-80.[11] He has,

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[11] In Hohman v. A. S. Abell Co., 44 Md. App. 193, 200-201, 407 A.2d 794, 798 (1979), the court discussed the proof of malice required:

> "The New York Times or the so called 'constitutional malice' doctrine focuses primarily on the element of scienter. Knowing falsity or reckless disregard for truth involves proof of a 'high degree of awareness of . . . probable falsity . .,' Garrison v. Louisiana, supra, such that the defendant 'entertained serious doubts as to the truth of his publication.' St. Amant v. Thompson, 390 U.S. 727, 731, 88 S.Ct. 1323, 1325, 20 L.Ed.2d 262 (1968). Accord Marchesi v. Franchino, 283 Md. 131, 387 A.2d 1129 (1978)."

[Delia v. Berkey, 41 Md. App. 47, 51-53, 395 A.2d 1189, 1192 (1978).] To prove "reck-less disregard", as required by New York Times v. Sullivan, supra, appellant had to adduce sufficient evidence to permit the conclusion that appellee in fact entertained serious doubts as to the

as indicated earlier in this opinion, clearly failed to do so.

D.

Finally, the district court found, in the context of the entire record, that none of the statements were defamatory. The court was correct. Many of the statements were indeed Macon's opinion,

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truth of the publication. See Saint Amant v. Thompson, 39 U.S. 727, 731, 88 S.Ct. 1323, 1325, 20 L.Ed.2d 262 (1968), where the Court stated:

> "These cases are clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts show reckless disregard for truth or falsity and demonstrates actual malice." [Emphasis added.]"

labelled as such. See Potomac Valve and Fitting, Inc. v. Crawford Fitting Co., 829 F.2d 1280, 1286 (4th Cir. 1987) (First Amendment protects statements of opinion). And, as the district court noted, where Macon reported factual incidents that De Leon denied, he consistently noted De Leon's denial or explanation.

This opinion has been as exhaustive (or exhausting) as it has been for De Leon's contentions portend potentially serious consequences for a professional at the threshold of his career. Yet, especially where the risks of unsatisfactory performance are particularly unacceptable, as in a hospital where matters of life and death are all too frequent, the doctor in De Leon's position should ponder whether "the

fault, dear Brutus, is not in our stars."

The judgment is

AFFIRMED[12]

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[12] Appellant's motion to strike part of the record is denied.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MARYLAND

JOSE DeLEON, M.D., et al.,	*	
Plaintiffs	*	
	*	Case No. H 86-1609
SAINT JOSEPH HOSPITAL, INC., et al.,	*	
	*	
Defendants		
*	*	*

AMENDED COMPLAINT WITH RENEWED REQUEST FOR A JURY TRIAL

Now come the Plaintiffs Jose S. DeLeon, M.D. and Maria G. DeLeon, his wife, by Howard J. Schulman, their attorney, and state:

JURISDICTION

1. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1332. Plaintiffs each are citizens and subjects of the Republic of the Philippines. Defendant St. Joseph Hospital, Inc. is

incorporated under the laws of the State of Maryland and has its principal place of business in Towson, Maryland. Defendant Dr. Macon is a citizen of the State of Maryland. The amount in controversy exceeds Ten Thousand Dollars ($10,000.00), exclusive of interest and costs.

COUNT I

(CLAIM AGAINST ST. JOSEPH HOSPITAL FOR BREACH OF CONTRACT)

2. At all times relevant hereto and prior to July 1, 1983, Defendant Saint Joseph Hospital, Inc. (St. Joseph) operated a graduate residency program in the specialty of general surgery (the "Program") at its Towson, Maryland facility. In the course thereof, Defendant did represent, contract and

otherwise promise to, among others, prospective resident trainees, participating resident trainees, patients, licensing authorities, such as the Maryland Board of Medical Examiners, and members of the public that surgery residents whom it trained would be provided adequate opportunity under the guidance and supervision of a qualified teaching staff to develop a satisfactory level of clinical maturity, surgical judgment and technical skill which would, upon satisfactory completion of the Program, render its resident trainees fit for the safe and independent practice of surgery. In exchange for this training, among other things, resident trainees provided their labor and services to the Defendant and its patients. Additionally, resident trainees were promised

that upon the satisfactory completion of the Program they would be " afforded admission privileges to Defendant, given the satisfaction of its other admission criteria.

3. From on or about July 1, 1980 to the completion of his senior/chief year of residency on or about June 30, 1983, Plaintiff Dr. DeLeon was a resident trainee in the Program, and Defendant St. Joseph did promise and contract with Plaintiff Dr. DeLeon as aforesaid. At the completion of Plaintiff's training, Defendant St. Joseph certified that Plaintiff Dr. DeLeon had fulfilled and received an appropriate educational experience and attained sufficiently high levels of knowledge, judgment and clinical skills so as to be prepared for the independent practice of surgery and

otherwise had satisfactorily performed and had been responsibly involved in performing critical portions of operative procedures, as well as other patient care.

4. Plaintiff Dr. DeLeon was a contractual medical staff member at the St. Joseph Hospital from on or about July 1, 1983 through on or about May 9, 1985, during which time Dr. DeLeon served competently as a surgical house office. Plaintiff Dr. DeLeon first applied for privileges to Defendant St. Joseph in January 1984. At that time, the criteria for privileges, as embodied in the Bylaws of Defendant's Medical Staff and other operative contractual documents, consisted of Board eligibility, training in a specialty, two letters of recommendation and a license from the

State of Maryland.

Plaintiff Dr. DeLeon satisfied all of these criteria, including favorable recommendations from the Program's Director and the Chairman of the Defendant's Department of Surgery during the course of Plaintiff's surgical residency training. On June 20, 1984, William L. Macon, IV, M.D., Defendant's Chief of Surgery, certified that Plaintiff was competent and clinically skilled to independently perform eighteen separate types of surgical procedures.

5. In October 1984, Plaintiff Dr. DeLeon was advised by Defendant that his application for attending staff privileges in general surgery had been denied. The ostensible bases for this denial of privileges were that Dr. DeLeon did not have satisfactory knowledge,

judgment and clinical skills for the independent practice of surgery and had been incompetent during the course of his residency training and house staff appointment. The rationale upon which these bases were predicated were pretextual in nature and were calculated to circumvent the terms of Plaintiff's contract. The information offered in support thereof was supplied and procured by Dr. Macon and was false, unsubstantiated and distorted. Thereafter, Dr. Macon continued and did fabricate, manufacture and/or distort additional factual predicates to substantiate the denial of privileges to the Plaintiff; and, to this same end, Plaintiff was summarily suspended on May 9, 1985 from his duties as a house staff officer, without the benefit of Article VIII

(Corrective Action, Hearing and Appellate Review Procedure) of the Bylaws of the Medical Staff of the St. Joseph Hospital.

6. The denial of privileges to Plaintiff Dr. DeLeon and his suspension have professionally stigmatized the Plaintiff so that he is unable to obtain privileges at any other hospital and has thereby been precluded from practicing as a surgeon.

7. Dr. Macon, who in his capacity as the Defendant's chief of surgery, was an authorized agent, servant and employee of Defendant in this matter; and, Plaintiff alleges thereby that Defendant St. Joseph acted intentionally to harm Plaintiff or, in the alternative, with wanton and reckless disregard of Plaintiff's rights.

8. As a consequence of the foregoing breaches of contract by the Defendant St. Joseph, Plaintiff was caused to lose past and prospective income as a practicing surgeon and, additionally thereto, caused to incur other consequential and incidental expenses and losses.

WHEREFORE, Plaintiff, Jose S. DeLeon, M.D., requests the following relief:

a. a money judgment from the Defendant Saint Joseph Hospital in the amount of Three Million Dollars ($3,000,000.00) compensatory damages;

b. a specific performance of contract, i.e., admission to the active medical staff of the Saint Joseph Hospital; and

c. such other and further

relief as justice and the nature of this case may require.

COUNT II

(CLAIMS AGAINST ST. JOSEPH HOSPITAL FOR DEFAMATION AND INTERFERENCE WITH ECONOMIC RELATIONS)

9. Plaintiff incorporates by reference herein all those relevant allegations contained in ¶¶ 1 through 8 of this Complaint; and, further says that the Defendant St. Joseph published many statements, written and oral, to the effect that Plaintiff did not have satisfactory knowledge, judgment and clinical skills for the independent practice of surgery and had been incompetent during the course of his residency training and house staff appointment and did stigmatize Plaintiff with the termination of his house staff officer contract, when Defendant St. Joseph knew

the falsity thereof, as well as the falsity of the underlying medical and other information upon which such opinions and publications were based; or, alternatively, Defendant St. Joseph acted with reckless disregard for the truth of such matters and otherwise without good faith.

10. In the alternative, Plaintiff incorporates by reference herein all those relevant allegations contained in ¶¶ 1 through 9 of this Complaint and alleges that Defendant Saint Joseph acted purposely to interfere with Plaintiff's prospective economic advantage as a practicing surgeon.

11. As a proximate consequence of the foregoing intentional and willful conduct, Plaintiff has been caused to suffer the damages and losses heretofore

recounted; and, in addition, Plaintiff has suffered the loss of personal and professional reputation and has lost the benefit of his many years of labor and expense in preparation for the practice of surgery, the fulfillment of practicing as a physician in his specialty and such other professional enjoyment and satisfaction as would be experienced by a professional man of Plaintiff's years, as well as a husband and father; and, further, Plaintiff has endured the stigma, humiliation, mental anguish, embarrassment, and degradation of being terminated and stigmatized as incompetent.

WHEREFORE, Plaintiff, Jose S. DeLeon, M.D., demands from Defendant St. Joseph Hospital Five Million Dollars ($5,000,000.00) in compensatory damages

and Five Million Dollars ($5,000,000.00) in punitive damages.

COUNT III

(INTERFERENCE WITH ECONOMIC RELATIONS BY WILLIAM L. MACON, IV, M.D.)

12. Plaintiff incorporates by reference herein all those relevant allegations contained in ¶¶ 1 through 6 of this Complaint; and, further says in the alternative that Defendant Dr. Macon was motivated by his own ill will and spite toward the Plaintiff and otherwise acted upon his own personal motives in manufacturing and manipulating the denial of Plaintiff's privileges, as well as his termination, and did act purposely to interfere with Plaintiff's contract and prospective economic advantage with Defendant St. Joseph Hospital and otherwise as a practicing surgeon; and,

Plaintiff alleges that Defendant Dr. Macon acted with wanton and reckless disregard of Plaintiff's rights, if not intentionally to harm Plaintiff.

13. As a proximate consequence of this conduct by Defendant Dr. Macon, Plaintiff has suffered the losses and damages particularized in ¶¶ 8 and 11 of this Complaint.

WHEREFORE, Plaintiff, Jose S. DeLeon, M.D., demands from Defendant Dr. Macon Five Million Dollars ($5,000,000.00) in compensatory damages and Five Million Dollars ($5,000,000.00) in punitive damages.

COUNT IV

(DEFAMATION BY WILLIAM L. MACON, IV, M.D.)

14. Plaintiff incorporates by reference herein all those relevant

allegations contained in ¶¶ 1 through 6 of this Complaint; and, further says that the specific information imparted by Defendant Dr. Macon, to the effect that Plaintiff did not have satisfactory knowledge, judgment and clinical skills for the independent practice of surgery and had been incompetent during the course of his residency training and house staff appointment, was knowingly false or made in reckless disregard of the truth thereof and was otherwise without good faith; and, as a proximate consequence of this intentional and willful malicious conduct by Defendant Dr. Macon, Plaintiff has suffered the losses and damages particularized in ¶¶ 8 and 11 of this Complaint.

WHEREFORE, Plaintiff, Jose S. DeLeon, M.D., demands from Defendant Dr.

Macon Five Million Dollars ($5,000,000.00) in compensatory damages and Five Million Dollars ($5,000,000.00) in punitive damages.

COUNT V

(LOSS OF CONSORTIUM)

15. For separate and distinct claim, Plaintiffs Jose S. DeLeon and Maria G. DeLeon, his wife, incorporate by reference those relevant allegations contained in ¶ 1 and Counts II through IV of this Complaint and further say that they have been husband and wife since June 29, 1975 and have suffered detriment and loss to their marital relationship as a proximate consequence of the wrongful acts alleged.

WHEREFORE, Plaintiffs Jose S. DeLeon and Maria G. DeLeon demand judgment against each of the Defendants

St. Joseph Hospital and William L. Macon, IV, M.D. in the amount of Five Hundred Thousand Dollars ($500,000.00) in compensatory damages and Five Hundred Thousand Dollars ($500,000.00) in punitive damages.

OPPOSITION

BRIEF

Supreme Court, U.S.
FILED
JUL 26 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-2124

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOSE S. DELEON AND
MARIA G. DELEON,

Petitioners

v.

SAINT JOSEPH HOSPITAL, INC. AND
WILLIAM L. MACON, IV,

Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Court of Appeals so far depart from the accepted and usual course of judicial proceedings as to justify this Court's review when it affirmed the trial court's grant of respondents' motion for summary judgment as to the petitioner's defamation claims because (1) the challenged statements, made during a hospital credentials investigation, were protected by privilege; (2) petitioner failed to present sufficient evidence that the statements were false; (3) the action was barred by a release signed by the petitioner; and (4) petitioner failed to present evidence of malice sufficient to overcome the release and applicable privileges?

THE PARTIES

This statement is submitted pursuant to Rule 28.1 of this Court. Saint Joseph Hospital, Inc. is a nonprofit charitable corporation incorporated in Maryland. It does not have any subsidiaries or affiliates. Its sole member is Franciscan Health Services of Maryland, Inc., a nonprofit Maryland corporation. All parties below are set forth in the caption to this case.

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BRIEF IN OPPOSITION

The respondents respectfully pray that this Court deny the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this proceeding.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 871 F.2d 1229 (4th Cir. 1989). (Apx. 47-86). The unpublished District

Court opinion granting summary judgment in favor of respondents is contained in the appendix to the petition. (Apx. 1-44).

JURISDICTION

The petitioner seeks review by certiorari pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The petitioner, Jose S. DeLeon, M.D., ("DeLeon"), a surgeon, applied for medical staff privileges to enable him to admit patients to respondent Saint Joseph Hospital ("the Hospital") in Towson, Maryland. DeLeon had been a "house surgeon" employed at the Hospital, who could not admit patients and could treat patients only under another physician's supervision. In his application, DeLeon signed a release absolving the Hospital and persons providing information from civil liability in connection with the credentialling process. (Apx. 6, 50).

DeLeon's application, along with references submitted by physicians familiar with his qualifications, was considered by the Hospital's Credentials Committee, which found his credentials unsatisfactory. (Apx. 7, 10-11, 52-53). This negative evaluation was forwarded to various committees and ultimately the Board of Trustees of the Hospital ("the Board") denied DeLeon's application for privileges. (Apx. 11, 53).

Dr. DeLeon appealed the decision to the Hospital's Board, an *ad hoc* committee of the Board was convened, and evidentiary hearings were held. (Apx. 13-54). Following the hearings, the *ad hoc* committee issued a lengthy report recommending that DeLeon's application be denied. The Board met

and again voted to deny Dr. DeLeon's application for privileges based upon unsatisfactory credentials. (Apx. 48-56, 1-16).

DeLeon filed suit against the respondent Hospital and William L. Macon, IV, M.D., the head of the department of surgery at the Hospital, seeking injunctive relief, and compensatory and punitive damages for breach of contract, interference with economic advantage and defamation. During the course of discovery, Deleon deposed nearly every nurse and physician who had contact with him while he was employed at the Hospital. None of these nurses or physicians, however, provided any additional favorable evidence concerning the petitioner's qualifications. (Apx. 31, 55-56). To the contrary, the depositions taken revealed many instances of misconduct and incompetence which had not been previously reported to the Hospital committees. (Apx. 31, 56).

The Hospital and Dr. Macon moved for summary judgment on all counts of the complaint, and memoranda were filed in support of and in opposition to the motion. The record before the lower courts was voluminous and included transcripts of the *ad hoc* committee hearings, contemporaneous documentation of complaints made about DeLeon's performance, the Board's *ad hoc* committee report, documents reflecting DeLeon's substandard performance on written examinations, physician appraisals of DeLeon's performance and abilities, and well over 20 deposition transcripts.

The basis for the motions for summary judgment was, in essence, that Dr. Macon had fulfilled his duty, as head of the department of surgery, in informing the various committees of complaints which had been made to him by nurses and physicians concerning DeLeon's unavailability and dereliction in his duties. He objectively reported the nature of the complaints, expressed his own opinions concerning DeLeon's qualifications, and informed the committees of those factual incidents

which DeLeon denied. Respondents argued that Dr. Macon's statements were not false, and were protected by conditional privileges recognized under Maryland statutory and common law.[1] Respondents further argued that there was no evidence to support DeLeon's contention that they acted in bad faith or with malice so as to overcome these privileges and the release signed by DeLeon.

In response to the motion for summary judgment, DeLeon relied almost exclusively upon his own testimony that he believed that he was qualified and had performed satisfactorily as a house surgeon. (Apx. 31-32). In his memorandum, DeLeon argued, as he now argues in this Court, that there was

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[1]MD. HEALTH OCC. CODE ANN. § 14-601 (1986 & Supp. 1988) provides in pertinent part that:

> (f) *Immunity from civil liability.* — A person who acts in good faith and within the scope of jurisdiction of a medical review committee is not civilly liable for any action as a member of the medical review committee or for giving information to, participating in, or contributing to the function of the medical review committee.

MD. HEALTH OCC. CODE ANN. § 14-603 (1986 & Supp. 1988) provides in pertinent part:

> (c) *Immunity from civil liability.* — A person described in subsection (b) of this section is not civilly liable for giving information to any hospital, hospital medical staff, related institution, or other health care facility, professional society, medical school, or professional licensing board, if the person:
>
> (1) Gives the information in good faith and with the intention of aiding in the evaluation of the qualifications, fitness, or character of a physician; and
>
> (2) Does not represent as true any matter that the person does not reasonably believe to be true.

Moreover, Maryland law recognizes that communications arising in an employment context or by common interest in the subject matter are privileged. *See, e.g., General Motors Corp. v. Piskor*, 277 Md. 165, 352 A.2d 810 (1976); *Hanrahan v. Kelly*, 269 Md. 21, 305 A.2d 151 (1973); *Exxon Corp. v. Schoene*, 67 Md. App. 412, 508 A.2d 142 (1986).

evidence which would permit an inference of malice on Dr. Macon's part in connection with Dr. DeLeon's application.

The District Court conducted a painstaking review of the entire record and, after a hearing, granted summary judgment for the respondent Hospital and Dr. Macon on all counts. The District Court held that the release executed by DeLeon precluded his recovery, as a matter of Maryland law, on each of the claims asserted by DeLeon in his complaint. (Apx. 25-33). The District Court addressed each of DeLeon's contentions and concluded that, even in the absence of the release, DeLeon claims were not supported by the record.[2] As to DeLeon's defamation claims, the trial court held alternatively that (1) DeLeon's claims were barred by a release executed by him at the time of his application; (2) There was no legally sufficient publication of allegedly defamatory material; (3) Even if defamatory, the statements were privileged under Maryland law; and (4) The statements were not defamatory. (Apx. 37-42).

On appeal, DeLeon challenged only the District Court's ruling on the defamation counts. (Apx. 56 n.6). The Court of Appeals for the Fourth Circuit independently reviewed the entire record, and concluded that summary judgment had been properly granted in favor of the respondents.

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[2]As to DeLeon's breach of contract claim, the District Court held that there was no legal or factual basis for DeLeon's "somewhat surprising" contention that he was automatically entitled to privileges, regardless of the quality of his work, merely because DeLeon had submitted two references and was a licensed physician. (Apx. 35-37). The District Court further held that the record was devoid of any evidence of bad faith sufficient to prove a claim for intentional interference with economic relations, and held, in the alternative, that Dr. Macon and the Hospital, as parties to the "contract" with DeLeon, could not by definition tortiously interfere with that contract. (Apx. 42-44). DeLeon abandoned these claims on appeal. (Apx. 56 n.6).

In his argument on appeal, DeLeon claimed that Dr. Macon had made "false statements" about DeLeon during the credential evaluation process. He urged that these statements were made with "actual malice" sufficient to invalidate the release agreement and conditional privileges.[3] The Court of Appeals reviewed each alleged "false statement," and concurred with the District Court's conclusion that none of the statements were false. (Apx. 66-72). The Court reviewed DeLeon's claim of bad faith or intent, and concurred that none of the "facts" set forth by DeLeon were probative or supported in the record. (Apx. 72-74). On April 6, 1989, the Court of Appeals affirmed the District Court judgment. DeLeon now seeks plenary review in this Court.

This Court's exercise of its extraordinary and discretionary jurisdiction is not warranted. The case was correctly decided below and the lower courts correctly applied Federal Rule of Civil Procedure 56. Moreover, the issues raised by petitioner are unlikely to recur because the circumstances underlying this case - a credential review of a physician's qualifications — necessarily involve a case-by-case review of each individual record.

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[3]Under Maryland law, once a common law or statutory privilege applies, it must be overcome by a showing of actual malice, as set forth in *New York Times v. Sullivan*, 376 U.S. 254 (1964). *Marchesi v. Franchino*, 283 Md. 131, 139, 387 A.2d 1129, 1133 (1978).

ARGUMENT

DeLeon claims that review in this Court is warranted to "clarify" this Court's decision in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). He claims that the decision of the courts below "involved a trial by affidavit" contrary to the *Anderson* opinion. Nothing could be further from the truth. Discovery in this case continued for nearly two years before motions for summary judgment were filed. DeLeon took over twenty depositions, and the witnesses were cross examined about their opinions as to DeLeon's qualifications to practice surgery, as well as his performance as a house surgeon. DeLeon was nevertheless unable to adduce any evidence that Dr. Macon's statements were false or made with actual malice.

The lower courts correctly applied the principles articulated by this Court in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Both the District Court and the Court of Appeals relied upon and quoted extensively from *Anderson*. (Apx. 16-21, 58-60). Both courts conducted, as mandated by *Anderson*, "the threshold inquiry of determining whether there [was] the need for a trial — whether, in other words, there [were] any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson*, 477 U.S. at 250. (*See* Apx. 21, 25 31-33, 40, 59-60, 63-75). Both courts concluded that, on the record before them, the evidence was not sufficiently probative to warrant submission to a jury. The trial court specifically concluded that "[o]n the present record, . . . [DeLeon] has failed to establish a triable issue of fact under any of the legal theories advanced." (Apx. 25). The Court further noted that DeLeon had:

> failed to establish a triable issue of fact as to whether any of the [respondents'] actions were undertaken in bad faith. [DeLeon's] bald self-serving assertions to the contrary, which have no support in the entire extensive record, are insufficient to meet the requirements of Rule 56. *See Ross,* [*v. Communications Satellite Corp.*], 753 F.2d [355] at 365 [4th Cir. 1985)].

(Apx. 43). The Court of Appeals concurred:

> The proper analysis, therefore, is not simply whether there were disputed issues of fact; clearly DeLeon has met that simple burden. "Only disputes over facts that might affect the outcome of the suit under the governing laws will properly preclude the entry of summary judgment." *Anderson,* 477 U.S. at 248. Even after considering the record in the light most favorable to DeLeon, we are unable to detect any issue of fact relevant to the disposition of the case that would preclude the defendants from judgment as a matter of law.

(Apx. 59). The Court of Appeals reviewed each of DeLeon's assertions, and concluded that the record was devoid of any false statement made by Dr. Macon about the petitioner. (Apx. 66-72). Nor was there any support in the record for DeLeon's claim that the respondents acted with malice:

> DeLeon has proceeded to list various other "facts" and anomalies which, even if true, do not bear out his claims. A mere scintilla of evidence does not suffice to provide factual support for DeLeon's claims of wanton behavior and bad faith. DeLeon's "facts" are nothing more than conclusory allegations. Of the above "falsities," only one is supported *at all* and, with its accompanying qualification, is hardly dispositive. DeLeon has not even approached a showing

> of the extreme, wanton behavior needed to disregard the release.
>
> . . .
>
> Among the other allegations and assertions produced by DeLeon, we can find no basis for charges of "willful misconduct." "Unsupported allegations as to motive do not confer talismanic immunity from Rule 56." *Ross v. Communications Satellite Corporation*, 759 F.2d 355, 365 (4th Cir. 1985). Without support as to intent or wantonness, the release precluded recovery on every claim DeLeon has alleged.

(Apx. 59-60, 72).

DeLeon claims that the lower courts "enmeshed themselves in the fact-finding process." Petition at 25. The lower courts did not, however, find facts or resolve conflicting evidence. The courts merely performed the duty required of any judge in ruling upon a motion for summary judgment or directed verdict: to review the evidence and determine whether it is sufficiently probative to justify sending the case to a jury. In this case, both lower courts reviewed the record and properly inquired "whether there is [evidence] upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed." *Anderson, supra* at 252 (quoting *Improvement Co. v. Munson*, 14 Wall. 442, 448, 20 L.Ed. 867 (1872)). Both courts concluded that DeLeon had fallen short of producing probative evidence of bad faith or malice sufficient to warrant a jury's consideration of the issue. (Apx. 32-33, 43, 60, 66, 72-75).

DeLeon appears to argue that summary judgment under Rule 56 is inappropriate in any case which touches upon "state of mind factual issues." Petition at 25. Yet this Court rejected that very position in *Anderson*, 477 U.S. at 256, and reaffirmed that the mere fact that "state of mind" may be at issue

does not alleviate the plaintiff's burden of producing evidence which would support a jury verdict.[4] "Rule 56(e) itself provides that a party opposing a properly supported motion for summary judgment may not rest upon mere allegation or denials of his pleadings, but must set forth specific facts show-

[4]That the "actual malice" test may, in some circumstances, involve an appraisal of the defendant's state of mind does not mean that a plaintiff is entitled to get to the jury. For example, in *Time, Inc. v. Pape*, 401 U.S. 279 (1971), this Court reinstated a directed verdict for the defendant on this issue. More recently, in *Harte-Hanks Communications, Inc. v. Connaughton*, 57 U.S.L.W. 4846 (No. 88-10, June 22, 1989), this Court reiterated that "[t]he question whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law." *Id.* at 4854 (citing *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 510-511 (1984)).

In circumstances similar to those alleged in the instant case, many courts have granted summary judgment in favor of a hospital or staff members providing information in a credential inquiry or peer review proceeding. *E.g., Hayden v. Bracy*, 744 F.2d 1338, 1343-44 (8th Cir. 1984) (Arkansas statute for qualified peer review immunity barred defamation claim of physician); *George v. Hilaire Farm Nursing Home*, 622 F. Supp. 1349 (S.D.N.Y. 1985) (where defendant administrator had duty to report incidents to nursing home, defamation claim based on reports failed); *Kinney v. Daniels*, 574 F. Supp. 542 (S.D.W.Va. 1983) (Chief of Service published letter in context of peer review; summary judgment granted on defamation claim); *Scappatura v. Baptist Hospital of Phoenix*, 120 Ariz. 204, 584 P.2d 1195 (1978) (to avoid entry of summary judgment, physician/plaintiff must come forward with clear evidence of bad faith); *Brandwein v. Gustman*, 367 So. 2d 725 (Fla. Dist. Ct. App. 1979) (dismissing complaint for failure to allege specific facts indicating malice on the part of the defendants); *Heying v. Simonaitis*, 126 Ill. App.3d 157, 466 N.E. 2d 1137 (1984) (nurse's and physician's testimony regarding complaints about plaintiff nurse, viewed in context of entire transcribed proceeding, held not defamatory or interference with economic relations; discord arising out of plaintiff's criticism of training procedures insufficient to overcome "good faith" privilege); *Regualos v. Community Hospital*, 140 Mich. App. 455, 364 N.W.2d 723 (1985) (where plaintiff failed to submit clear and convincing proof that defendants acted with malice, summary judgment properly granted for defendants); *Campbell v. St. Mary's Hospital*, 312 Minn. 379, 252 N.W.2d 581 (1977) (en banc) (summary judgment granted for hospital in plaintiff's suit for defamation and interference with business).

ing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 256. DeLeon's ascriptions of Dr. Macon's motive, which he urged were "inferences" to be drawn from the record, were analyzed in detail by the lower courts (Apx. 66-75), and were found to be either without support in the record, or not relevant to the dispositive issues in the case.

An examination of the record in this case confirms that the District Court and the Court of Appeals acted in conformity with the principles articulated in Rule 56 and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Neither court "so far departed from the accepted and usual course of judicial proceedings. . . as to call for an exercise of this Court's power of supervision." Rule 17.1

CONCLUSION

For the reasons set forth herein, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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